Applicant Details

First Name	**Laith**
Middle Initial	**M.**
Last Name	**Adawiya**
Citizenship Status	**U. S. Citizen**
Email Address	**lmadawiya@ucdavis.edu**
Address	**Address** Street **8 El Vado Drive** City **Rancho Santa Margarita** State/Territory **California** Zip **92688** Country **United States**
Contact Phone Number	**(949)-973-8101**

Applicant Education

BA/BS From	**University of California-Los Angeles**
Date of BA/BS	**June 2021**
JD/LLB From	**University of California, Davis School of Law (King Hall)** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90502&yr=2011**
Date of JD/LLB	**May 11, 2024**
Class Rank	**Below 50%**
Law Review/ Journal	**Yes**
Journal(s)	**Journal of International Law and Policy** **Business Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Neumiller Moot Court Competition** **ABA National Appellate Advocacy Competition** **Appellate Advocacy I & II**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Tang, Aaron
aatang@ucdavis.edu
Wagner, Ryan
ddawagner@ucdavis.edu
Canzoneri, Michael
macanzoneri@ucdavis.edu
Joseph, Jeannie
jjoseph@occourts.org

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Cover Letter **Laith M. Adawiya**

United States District Court – Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

Please find attached my resume, writing sample, transcripts, and letters of recommendation for your review and consideration in connection with your Chamber's 2024 – 2025 Clerkship. I have just completed my second year at the UC Davis School of Law and am on track to graduate in the Spring of 2024. Following my graduation, I hope to fulfill my life-long career goal of working in public service. Towards that end, I believe that this Clerkship opportunity, and the experience it will provide me, will be the perfect first step in achieving that goal.

My passion for public service began in high school, when I came upon a speech given by Senator Robert F. Kennedy in Indianapolis following the assassination of Martin Luther King Jr. I was so struck by the eloquence and passion of his words – a call for peace and understanding between all Americans – that I decided to dedicate my professional life to public service; to pursue a career that, in the spirit of Senator Kennedy, attempts to help the poor and underprivileged. From a young age, my parents instilled in me the importance of integrity, justice, and the impartiality of law in society; and perhaps no institution is more dedicated to these ideals than the Judiciary.

As a District Court, your Chambers are at the forefront of debates regarding national matters, issuing rulings that will affect countless Americans. The areas in which the Eastern District Court of Virginia engages – ranging from civil rights, to immigration, to administrative procedure – interest me tremendously. And as a law student, an aspiring public servant, and much more importantly, a fellow American, I hope to partake in that work; to aid in the process of ensuring that the Judiciary continues to commit itself towards that demanding, yet admirable goal of "Equal Justice Under the Law."

My studies and work experience thus far – outlined on the attached resume - have only served to strengthen my dedication to that cause, and I believe have prepared me well for this Clerkship opportunity. I am confident that you will find me to have a very strong work ethic, and who will support your Chambers reviewing trial records, researching applicable law, and drafting legal memoranda and court opinions among other things.

For those reasons, and more, it would be an honor to be selected for your Chamber's 2024 – 2025 Clerkship, and work alongside you and other dedicated professionals that share my passion for public service.

Please do not hesitate to contact me should you need any additional information. I thank you for your consideration, and look forward to hearing from you.

Sincerely,

Laith M. Adawiya

Email: lmadawiya@ucdavis.edu Phone Number: (949)-973-8101

Laith M. Adawiya

Phone: (949) 973-8101
Email: lmadawiya@ucdavis.edu

Education

J.D. | Expected Graduation Date: May, 2024
University of California, Davis School of Law, CA 95616

B.A. in Political Science | Graduation Date: June, 2021
University of California, Los Angeles, CA 90095
Focus: American Politics
Minor: History
GPA: 3.918/4.00 – Magna Cum Laude

A.A. in Political Science | Graduation Date: May, 2019
Saddleback College, CA 92692
GPA: 4.00/4.00

Experience

Legal Intern | June 2023 – August 2023
Office of Legislative Counsel, Sacramento, CA 95814

- Provide legal advice to California State legislators regarding constitutional, administrative, and procedural matters
- Assist in the drafting of legislation for the California State Legislature

Superior Court Judicial Extern | June 2022 – August 2022
OC Superior Court, Orange County, CA 92701

- Observed OC Superior Court arraignments, trials, and other proceedings
- Discussed case issues with Judges and other Externs
- Completed legal memorandum as assigned by Judge

Undergraduate Reader | October 2020 – December 2020
University of California, Los Angeles, CA 90095

- Attended "Political Science 145B – Federalism and Separation of Powers" course
- Met with instructor and other readers to go over grading format and course logistics
- Graded student essays and submitted constructive comments

College Extern | June 2020 – September 2020
U.S. Attorney's Office, Los Angeles, CA 90012

- Aided Assistant U.S. Attorneys with projects and casework through research, organization, trial preparation, transcription, and analysis of evidence, requiring security clearance
- Attended various panels hosted by officials from different agencies and branches of government

Student Assistant | September 2019 – March 2020
UCLA School of Law, Los Angeles, CA 90095

- Aided faculty assistants in day-to-day affairs
- Assisted with word-processing, department events, and basic administrative and clerical duties
- Internet research, data entry, running of errands, etc.

Guest Service Representative | June 2017 - September 2019
Courtyard Marriott, Foothill Ranch, CA 92610

- Greeted, registered, and assigned rooms to guests
- Promptly and effectively dealt with guest requests and complaints
- Reconciled cash drawer contents with transactions during shift

Congressional Intern | October 2017 - August 2018
Congresswoman Mimi Walters, Irvine, CA 92612

- Answered phone calls from constituents
- Aided staffers in day-to-day affairs
- Helped prepare various events in California's 45th district (e.g. Congressional Art Competition, Military Academy Showcase)

Languages & Skills

Foreign Language: Arabic
Office Applications: Microsoft Word, PowerPoint, Excel, & Outlook
Research Tools: Internet Explorer, Microsoft Edge, Google Advanced Search
Editing Applications: Adobe Acrobat

Achievements & Activities

Civil Rights Clinic – Fall 2023
UC Davis Law

Moot Court Honors Board – 2023-Present
UC Davis Law

Moot Court Judge Recruitment Chair – 2023-Present
UC Davis Law

ABA National Appellate Advocacy Competition – Spring 2023
UC Davis Law

Moot Court – Spring 2022, Fall 2022, Spring 2023
UC Davis Law

King Hall Negotiations Team Member – 2023-Present
UC Davis Law

King Hall Negotiations Team Intraschool Competition – Spring 2023
UC Davis Law

Journal of International Law and Policy (Submissions Chair) – 2023-Present
UC Davis Law

Journal of International Law and Policy (Research Editor) – 2022-2023
UC Davis Law

Business Law Journal (Editor) – 2022-2023
UC Davis Law

King Hall International Law Association (Vice President) – 2022 - 2023
UC Davis Law

Dean's Honors List – Winter 2020, Spring 2020, Fall 2020, Winter 2021, Spring 2021
UCLA

Dean's List – Fall 2017, Spring 2018, Fall 2018, Spring 2019
Saddleback College

Honors Program - 2018 - 2019
Saddleback College

Volunteer Service

Yolo County Animal Shelter – 2022 - Present

UNOFFICIAL PAGE: 1

LAITH M. ADAWIYA ID 920-258-398

PROFESSIONAL ACADEMIC RECORD

CURRENT COLLEGE(S): LAW
CURRENT MAJOR(S): LAW

ADMITTED: FALL SEMESTER 2021

INSTITUTION CREDIT:

FALL SEMESTER 2021

LAW	200	INTRODUCTION TO LAW	S	1.00	.00
LAW	202	CONTRACTS	B	4.00	12.00
LAW	203	CIVIL PROCEDURE	B-	5.00	13.50
LAW	207	RESEARCH & WRITING I	B	2.00	6.00

	COMPL	ATTM	PSSD	GPTS	GPA
TERM:	12.00	11.00	11.00	31.50	2.863
UC CUM:	12.00	11.00	11.00	31.50	2.863

SPRING SEMESTER 2022

LAW	200L	LAWYERING PROCESS LAB	S	.00	.00
LAW	200S	LAWYERING PROCESS	S	2.00	.00
LAW	201	PROPERTY	B	4.00	12.00
LAW	204	TORTS	B+	4.00	13.20
LAW	205	CONSTITUTIONAL LAW I	A	4.00	16.00
LAW	208	LGL RESRCH & WRITING II	B	2.00	6.00

	COMPL	ATTM	PSSD	GPTS	GPA
TERM:	16.00	14.00	14.00	47.20	3.371
UC CUM:	28.00	25.00	25.00	78.70	3.148

FALL SEMESTER 2022

LAW	206	CRIMINAL LAW	A-	3.00	11.10
LAW	227A	CRIMINAL PROCEDURE	B+	3.00	9.90
LAW	252A	INTRO CRIM LITIGATION	A-	2.00	7.40
LAW	282	ENERGY LAW	A	2.00	8.00
LAW	288C	NATIONAL SECURITY LAW	A-	2.00	7.40
LAW	410A	APPELLATE ADVOCACY I	S	2.00	.00

	COMPL	ATTM	PSSD	GPTS	GPA
TERM:	14.00	12.00	12.00	43.80	3.650
UC CUM:	42.00	37.00	37.00	122.50	3.310

SPRING SEMESTER 2023

LAW	210J	BEST PRACT FOR JUSTICE	A	2.00	8.00
LAW	219C	EVIDENCE	B-	4.00	10.80
LAW	267	CIVIL RIGHTS LAW	A-	2.00	7.40
LAW	296E	ART & CULTURAL LAW	A-	3.00	11.10
LAW	410B	MOOT COURT	S	2.00	.00
LAW	413	INTRSCHL COMPETITN	S	2.00	.00

	COMPL	ATTM	PSSD	GPTS	GPA
TERM:	15.00	11.00	11.00	37.30	3.390
UC CUM:	57.00	48.00	48.00	159.80	3.329

FALL SEMESTER 2023

WORK IN PROGRESS:

LAW	218	CONSTITUTIONAL LAW II	4.00
LAW	235	ADMINISTRATIVE LAW	3.00
LAW	246	FEDERAL JURISDICTION	3.00
LAW	263A	TRIAL PRACTICE	3.00

IN PROGRESS CREDITS: 13.00

********** CONTINUED ON NEXT COLUMN **********

LAITH M. ADAWIYA

CONTINUED

********** TRANSCRIPT TOTALS **********

TOTAL UNITS COMPLETED: 57.00 UC GPA: 3.329
UC BALANCE POINTS: 63.8

COMMENTS:
LAW WRITING REQUIREMENT SATISFIED - LAW 288C

********** MEMORANDA **********
UNIVERSITY REQUIREMENTS:

PREVIOUS DEGR:
BACHELOR OF ARTS 06/01/21
UC LOS ANGELES (UCLA)

END OF RECORD

UNOFFICIAL UC DAVIS TRANSCRIPT COMPUTER PRODUCED ON 06/03/23 - ISSUED TO STUDENT.

June 20, 2023

Dear Judge:

I write in support of Laith Adawiya, a current 2L at the University of California, Davis School of Law (and member of the graduating class of 2024) who is applying for a clerkship in your chambers.

Laith was a student in my Constitutional Law class last spring, the second semester of his 1L year. He earned an A grade, with a raw score that placed him 6th of 66 students in the class. I found his essay responses to be very well written and reasoned, in a way that stood out to me even as I was grading (anonymously) for the quality of its prose and analytical clarity. Laith's overall participation over the semester was strong, too, as he frequently volunteered to respond to difficult questions in class. His responses to cold-calls were in the average range, as I found him to sometimes overcomplicate his analyses. But in the big picture, this is only a marginal concern: I believe he is capable of performing well in a clerkship.

In terms of Laith's potential fit in chambers, Laith consistently came across during the semester as an engaged and diligent student. I believe he would be eager to jump into any clerkship environment.

Please feel free to contact me with any questions.

Sincerely,

Aaron Tang
Professor of Law
UC-Davis School of Law
(530) 752-1476
aatang@ucdavis.edu

UC DAVIS SCHOOL OF LAW

February 25, 2023

To Whom it May Concern,

We have had the privilege of teaching Laith Adawiya over the course of the last year. He has taken both our Introduction to Criminal Litigation course and our Best Practices for Justice seminar. Laith is a bright and hardworking law student who excelled in our classes.

He is a valuable contributor in discussions. During an intensive litigation course, Laith was adept at articulating and supporting his position. Perhaps even more impressive, Laith is equally adept at respectfully pushing back against opposing views and ensuring that the outcomes are fair and just. Laith is a strong and passionate candidate who will excel in his pursuit of what is right.

In addition to his participation in class, we have reviewed his legal writing abilities with the briefs he authored for our course. Laith is a fantastic writer. His work product is persuasive and extremely professional. As practicing prosecutors with over thirty years of combined legal experience, we are especially familiar with effective legal writing. Based on the materials we have reviewed, we believe Laith will excel as an advocate.

In summary, we recommend Laith Adawiya highly for the clerkship that he is seeking. He will make a fantastic addition to the program.

Sincerely,

Ryan Wagner
Adjunct Lecturer
UC Davis School of Law

Brian Feinberg
Adjunct Lecturer
UC Davis School of Law

UC Davis School of Law • 400 Mrak Hall Drive • Davis, California 95616 • tel 530.752.0243 • fax 530.752.7279 • www.law.ucdavis.edu KINGHALL

UNIVERSITY OF CALIFORNIA, DAVIS

BERKELEY • DAVIS • IRVINE • LOS ANGELES • MERCED • RIVERSIDE • SAN DIEGO •SAN FRANCISCO SANTA BARBARA • SANTA CRUZ

June 20, 2023

Dear Judge,

I would like to express my support for Laith Adawiya's application for a clerkship position with either the State or Federal courts. I feel confident recommending Mr. Adawiya, who I know as Laith, for this position, based on my opportunity to see his work while coaching him, as a second-year law school competitor, in the prestigious American Bar Association National Appellate Advocacy Competition in 2023, and while seeing him perform in the Appellate Advocacy classroom series, during his second year of instruction.

Laith distinguished himself as an outstanding oral advocate, researcher, and team player, while participating in the Moot Court program at King Hall. He performed very well at the Los Angeles regional competition in the 2023 NAAC Competition as a 2-L, where he argued the complex issue of whether an academic freedom exception applied to a professor's classroom speech, which prevented a public university from disciplining the professor for espousing views contrary to the curriculum and values of the university. What I saw during that experience was his command of the courtroom, incredible knowledge of the law of the problem, and his natural ability to answer difficult questions. Laith is a powerful advocate who exudes great knowledge and confidence, while presenting a calm eloquence. But equally important, in the weeks prior to the February competition rounds, I saw that Laith was an incredibly hard worker, who thoughtfully and critically evaluated the strengths and weaknesses of his arguments as well as those of his opposing counsel. Laith has a great mind for the law, and during the competition he was exceptionally deft at responding the court panel's questions, respectfully and persuasively advocating for his side. Moreover, throughout the competition, Laith was respectful to his competitors and supportive of his teammates. During this experience, I was also fortunate to observe his wonderful sense of humor and his enthusiasm for the law and advocacy.

In sum, I believe Laith's great ability to research and synthesize the law, along with his skill as an oral advocate to explain complex legal principles, will make him an excellent addition to any Court's chambers. Also, I am confident that his comfortable style of working with others will allow him to blend in well with the Court's judges, attorneys and staff.

If I can answer any questions or otherwise assist you further in your evaluation of Laith's application, please do not hesitate to call upon me.

Sincerely,

Michael Canzoneri
Continuing Lecturer
UC Davis School of Law
400 Mrak Hall Drive
Davis CA, 95616
(916) 990-5902

Superior Court of California
County of Orange

Chambers of
JEANNIE M. JOSEPH
JUDGE
C52

700 CIVIC CENTER DRIVE WEST
SANTA ANA, CA 92701
PHONE: 657-622-5251

June 20, 2023

To Whom It May Concern:

I am writing to recommend Laith Adawiya for a clerkship. Mr. Adawiya served as my extern during the summer of 2022 when he was a 1L. Mr. Adawiya was not only diligent, inquisitive, and hardworking, but he demonstrated excellent legal skills.

Over the course of the summer, Mr. Adawiya researched a number of legal issues that arose in criminal trials over which I presided. One issue was application of the new law on preemptory challenges in a criminal jury trial, how it differed from the prior state of the law, and the effects this law could have in the future. His work product was consistently thorough, well-researched, well-written, and well-thought out. His legal analysis was on point.

In addition, Mr. Adawiya was always keen to learn new things. He met all assignments with enthusiasm, embracing the opportunity to broaden his legal horizons. He took advantage of every opportunity to view all aspects of the justice system, including trials, preliminary hearings, law and motion, and calendar courts on the criminal side, as well as civil and family court matters.

Finally, Mr. Adawiya's personality made him a noteworthy extern. He was professional in interacting with everyone at the courthouse, including judges, attorneys, and staff. He was well-liked by everyone with whom he worked. He was simply a pleasure to have.

In sum, Mr. Adawiya is a stellar candidate for a clerkship, and I cannot recommend him highly enough. Please do not hesitate to contact me at (657) 622-5252 if you need more information.

Sincerely,

Jeannie M. Joseph
Judge, Orange County Superior Court

Writing Samples

Laith M. Adawiya

The following are portions of two recent writing samples; the first is part of my brief written for the ABA National Appellate Advocacy Competition in the Spring of 2023; it revolves around a professor's freedom of speech in the classroom, and whether or not there is an "academic freedom" exception to the Supreme Court case *Garcetti v. Ceballos*.

The second is part of a memorandum regarding *Batson/Wheeler* challenges and California's A.B. 3070. This was written during my externship with the Orange County Superior Court in the Summer of 2022.

ABA National Appellate Advocacy Competition Brief

The U.S. Court of Appeals for the Thirteenth Circuit was correct in finding for Westland Community College; the Petitioner's First Amendment rights were not violated. The reason for this is two-fold: firstly, this Court's decision in *Garcetti v. Ceballos* does not - and should not - provide for an "academic freedom" exception for public educators when teaching in classrooms; and secondly, since there is no "academic freedom" exception, and since the Petitioner was performing his "official duties" as a Government employee, his speech was not protected by the First Amendment.

Firstly, *Garcetti* does not provide for an "academic freedom" exception for in-classroom speech. While it is true that this Court mentioned "academic freedom" in *Garcetti*, its mention was little more than dicta in the Majority Opinion; it comprised a small paragraph – three brief lines – responding to Justice Souter's Dissenting Opinion. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006). In addition, it is unclear exactly how far-reaching that concept was intended to be, and what Justice Souter exactly meant by "academic freedom." Ultimately, the mention of "academic freedom" in *Garcetti* was more of a general indication that not *all* speech on a campus may necessarily be regulated; here, however, the only issue is "in-classroom" speech by an instructor.

It is also noteworthy that it was Justice Souter himself who – in an earlier case; *Board of Regents of University of Wisconsin v. Southworth* – wrote of a University's ability to dictate what is taught to students; no one claims, he wrote, "that [a] University is somehow required to offer a

spectrum of courses to satisfy a viewpoint neutrality requirement," for instance. *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 243 (2000). A "University need not provide junior years abroad in North Korea as well as France, instruct in the theory of plutocracy as well as democracy, or teach Nietzsche as well as St. Thomas." *Id*. There's an understanding, in other words, that a University can regulate the curriculum communicated to its students.

Here, the Petitioner accuses Westland Community College of attempting to "cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents of University of State of N.Y.*, 385 U.S. 589, 603 (1967). But this is unfounded. The Respondents agree with the Petitioner that academic freedom is an invaluable part of American society. But that academic freedom rests with the institution, not the individual professor. That was the implication of this Court in *Regents of University of California v. Bakke*, and it was the implication of Justice Frankfurter in *Sweezy v. State of New Hampshire*, in which he wrote that "it is the business of a University to provide that atmosphere which is most conducive to speculation, experiment, and creation… to determine for itself on academic grounds who may teach, what may be taught, [and] how it shall be taught." *Sweezy v. State of New Hampshire*, 354 U.S. 234, 263 (1957).

Indeed, it has been a long-standing premise that schools have the ability to regulate on-campus speech – including that of educators - without falling out of the First Amendment's favor. This is because, as the Seventh Circuit aptly put it, "a school system does not "regulate" teachers' speech as much as it hires that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary." *Mayer v. Monroe County Community School Corp.*, 474 F.3d 477, 479 (2007). And when one is paid a salary, they are expected to adhere to the policies and practices of their employer; this is not a revolutionary concept.

At the end of the day, a community college instructor is no different from any other government employee performing their job functions. Therefore, this court should not create an exception that would hamper a school's ability to discipline an instructor for in-class speech. This Court noted in *Hazelwood v. Kuhlmeier* that the classroom is not a "public forum" within the normal sense of the phrase - it is "reserved for other intended purposes" under which "school officials may impose reasonable restrictions on the speech of students, teachers, and other

members of the school community." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988). This is particularly true when dealing with "school-sponsored speech," or speech "that students, parents, and members of the public might reasonably perceive to bear the" school's 'stamp of approval.' *Id*. at 271. And by simple implication, any speech by an educator inside the classroom, while teaching a class, falls within this category of "school-sponsored speech."

And the Respondents are not alone in this belief; numerous Circuit Courts have relied heavily on this proposition in the conduct of their judicial affairs.

Justice Alito, writing then for the Third Circuit Court of Appeals, in *Edwards v. Cal. Univ. of Penn.*, acknowledged that "a public university professor does not have a First Amendment right to decide what will be taught in the classroom." *Edwards v. Cal. Univ. of Penn.*, 156 F.3d 488, 491 (1998).

The Tenth Circuit, too, has acknowledged - as it did in *Adams v. Campbell County* – that educators do not "have an unlimited liberty as to [the] structure and content of the courses" they teach. *Adams v. Campbell County School Dist.*, 511 F.2d 1242, 1247 (1975).

The Eleventh Circuit stated, "we do not find support to conclude that academic freedom is an independent First Amendment right." *Bishop v. Aronov*, 926 F.2d 1066, 1075 (1991). In *Bishop v. Aronov*, the University of Alabama tried to prevent Dr. Bishop from expressing his religious views in the classroom. In finding that Dr. Bishop's comments constituted "school-sponsored speech," the Eleventh Circuit held that "Dr. Bishop's interest in academic freedom and free speech do[es] not displace the University's interest inside the classroom," and that the University of Alabama was well-within its right to prohibit Dr. Bishop from expressing his religious views during class hours. *Id*. at 1076.

The Thirteenth Circuit has also noted - as it did in the proceedings of this case - "that there is no basis for carving out an exception from the *Garcetti* rule for in-class speech of a public college instructor." R. at 17.

This Court should thus maintain the status quo with respect to *Garcetti*, and explicitly hold that there is no "academic freedom" exception for in-class speech by an instructor.

Moving onto the second point; since there is no "academic freedom" exception for in-classroom speech, the "official duties" test of *Garcetti* should apply, meaning that the Petitioner's speech was not protected by the First Amendment.

Briefly summarized, at issue in *Garcetti* was a Deputy District Attorney - Cabellos - who claimed he was retaliated against for writing a memorandum pointing out inaccuracies in an affidavit. In holding that Cabellos' speech was not protected, this Court held that "when public employees make statements pursuant to their official duties, [they] are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421. The "controlling factor" in *Garcetti* was the fact that Cabellos had been making "expressions… pursuant [to his] duties as a [public employee]." *Id*.

With all that said, the Respondents would like to acknowledge the importance of exercising one's rights as a "citizen" while "on the job." Indeed, the Respondents agree with the Petitioner on this point. After all, this Court noted in the same breath in *Garcetti* that "public employees do not surrender all their First Amendment rights by reason of their employment." *Id*. at 417.

The threshold question, therefore, is whether or not one is speaking pursuant to their "official duties," or as a "citizen." Whether, as this Court acknowledged in *Kennedy v. Bremerton School District*, the employee was "acting within the scope of his duties" when speaking. *Kennedy v. Bremerton School District*, 142 S.Ct. 2407, 2425 (2022). Only if the answer is "yes" does the possibility of a First Amendment violation arise. But in the Petitioner's case, even assuming all facts alleged in the complaint are true, the answer is a resounding "no."

For the Petitioner acknowledged, in his own words, that the comments he had made in class were "a valid part of the lesson he was teaching." R. at 6. In no uncertain terms, he acknowledged that he was fulfilling his role as an educator employed by the Government when speaking inside the classroom. This is compounded by the fact that - similar to *Garcetti* – the Petitioner's comments were directly related to his responsibilities as an educator. Furthermore,

the Petitioner subsequently defended his comments to his superior, explaining that "philosophy students must learn to have a rational discussion on controversial issues." R. at 6.

Thus, taking the Petitioner's words at face value, it is clear that even he believed he was speaking pursuant to his "official duties." This means that his speech was not shielded by the First Amendment, and Westland Community College was well within its right to regulate it.

To conclude, the Petitioner was clearly acting in accordance with his "official duties" as a Government employee when lecturing students during class time, meaning such speech is not afforded the full breadth of the First Amendment's protection. Furthermore, it is established precedent - by this Court and Lower Courts - that Universities have the right to regulate an educator's speech inside the classroom without falling awry of the First Amendment.

The Respondents respectfully request that this Court clarify *Garcetti* with respect to academia as follows: there is no "academic freedom" exception to *Garcetti* for speech by an instructor in a classroom.

The heart of *Garcetti* - whether or not one is speaking pursuant to their "official duties" - should control even in academic public employment circumstances. As such, the First Amendment does not limit a public community college's power to discipline an instructor for in-class speech. With that said, the Respondents respectfully request that this Court affirm the Court of Appeals' ruling - that the Petitioner lacked a plausible First Amendment retaliation claim.

Memorandum on *Batson/Wheeler* Challenges and A.B. 3070

A centerpiece of the American judicial system involves the right to a trial by jury. So imperative to the administration of justice was this idea that three of the original ten Amendments comprising the Bill of Rights dealt with it. Indeed, the 5th Amendment forbids an individual to "be held to answer for a capital... crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. In cases of criminal prosecution, the 6th Amendment requires that "the accused shall enjoy [a trial by] an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. This has been further interpreted as requiring a jury consisting of a "representative cross-section of the community."

Taylor v. Louisiana, 419 U.S. 522, 528 (1975). Finally, the 7th Amendment requires that in cases involving a "value of controversy" exceeding $20, "the right of trial by jury shall be preserved." U.S. Const. amend. VII. In short, it is evident that the Founders considered the right to a trial by jury an indispensable part of the idea of 'blind and impartial justice.'

Of course, this right would be moot and inept if the composition of the jury in question was not selected on an impartial basis. This is the issue at hand with respect to the '*Batson/Wheeler* Challenge.' While conducting voir dire, or the selection of a jury, both the plaintiff and defendant are permitted to strike jurors 'for cause' if either side determines a valid reason for the jurors being unable to be 'fair and impartial.' In addition to these 'for-cause challenges,' each side also has a limited number of 'peremptory challenges' that can be used to remove any potential juror, without need for a reason. These 'peremptory challenges' "traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury." *Batson v. Kentucky*, 476 U.S. 79, 91 (1986). At the heart of the '*Batson/Wheeler* Challenge' is the issue of whether race, gender, or other 'group prejudices' are being taken into account during voir dire.

The justification for placing limitations on peremptory challenges lies in the history of juror discrimination. It can be said that the history of the United States has been exemplified by the gradual admission of marginalized groups into previously prohibited sectors of public life. One of these has been the ability to serve on a jury, and to not be arbitrarily denied that right simply because of one's identity. Over the years, courts have utilized the 14th Amendment's 'Equal Protection Clause' as the vehicle for this progress.

As early as 1880, in *Strauder v. West Virginia,* the Supreme Court had acknowledged that the discrimination of jurors on the basis of race was impermissible. Citing the recently ratified 14th Amendment, the Court ruled that "the very idea of a jury is a body... composed of [one's] neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Strauder v. State of W. Virginia,* 100 U.S. 303, 308 (1879). In doing so, the Court overturned a West Virginia statute excluding blacks from serving on juries, holding that it "amount[ed] to a denial of the equal protection of the laws." *Id.* at 310. From then on, the issue involved the degree to which unconstitutional discrimination was occurring in the selection of a jury, and the requirements to prove such a claim.

Writing Samples — Laith M. Adawiya

In *Batson v. Kentucky*, the Supreme Court was once again confronted with the issue of whether a defendant was "denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." *Batson*, 476 U.S. at 82. Specifically, a black man was charged with burglary, and subsequently convicted by an all-white jury. During the voir dire process, the prosecutor "used his peremptory challenges to strike all four black persons on the venire." *Id.* at 83. In *Batson*, the Court expanded on the central holding of *Strauder*, ruling that "purposeful racial discrimination in [the] selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Id.* at 86. The Court further added that while the prosecutor normally has discretion in using peremptory challenges "for any reason at all... the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors... will be unable impartially to consider the State's case against a black defendant." *Id.* at 89.

Ultimately, the *Batson* Court found that "a defendant may establish a prima facie case of purposeful discrimination in [the] selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges." *Id.* at 96. In order to prove this, "the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Id.* In addition, "the overall facts [must] indicate [that] the prosecutor['s]" reason for using the challenges was to "exclude the veniremen from the petit jury on account of their race." *Id.* Finally, it should be noted that "the defendant is entitled to rely on the fact" that peremptory challenges create an opportunity for "those to discriminate who are of a mind to discriminate." *Id.* "This combination of factors" in the selection of a jury "raises the necessary inference of purposeful discrimination." *Id.* If this standard has been met, "the burden [then] shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason." *People v. Lenix,* 187 P.3d 946, 954 (Cal. 2008). After all this, "the court determines whether the defendant has proven purposeful discrimination." *Id.*

Aside from race, courts have also wrestled with the use of peremptory challenges on the basis of other characteristics. With respect to the issue of gender, the Supreme Court in *Taylor v. Louisiana* struck down a section of the Louisiana State Constitution providing "that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service." *Taylor,* 419 U.S. at 523. In that case, it was ruled that the

"systematic exclusion of women from jury panels" was a violation of the 6th Amendment's guarantee of a jury being comprised of a "representative cross-section of the community." *Id.* at 528. Further, in 1994, the Supreme Court explicitly stated in *J.E.B. v. Alabama ex rel. T.B.* that "the Equal Protection Clause prohibits discrimination in jury selection [and the use of peremptory challenges] on the basis of gender, or on the assumption that an individual will be biased in a particular case" due to their gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994).

More recently, the 9th Circuit Court of Appeals extended the *Batson* precedent to sexual orientation. In *SmithKline Beecham Corp. v. Abbott Laboratories,* the Court ruled that "equal protection prohibits peremptory strikes based on" that characteristic. *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 474 (9th Cir. 2014).

While the aforementioned cases only dealt with the specified issues of race, gender, and sexual orientation, the California Supreme Court had already determined as early as 1978 in *People v. Wheeler* "that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under... the California Constitution." *People v. Wheeler,* 583 P.2d 748, 761-62 (Cal. 1978). Notably, the *Wheeler* Court did not limit the scope of its decision to specified characteristics, but to "group bias" in general. *Id.* It rationalized its decision on the understanding "that in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of resident, and political affiliation." *Id.* at 755. It is therefore reasonable to assume that the California Supreme Court utilized the phrase "group bias" in its broadest and most general form, in order to encapsulate segments and characteristics of the population that have no valid reason to be discriminated against for jury duty.

Recently, the use of the '*Batson/Wheeler* Challenge' has been altered by legislation in California. Perhaps in an effort to officially codify what *Wheeler* accomplished, A.B. 3070 § 231.7, which became effective on January 1, 2021, prohibits the use of peremptory challenges in criminal cases "on the basis of" a number of protected characteristics, including "race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation." Code Civ. Proc., § 226 (2021). In essence, A.B. 3070 § 231.7 legislatively affirms *Batson/Wheeler*, and specifies a range of new categories upon which peremptory challenges cannot be used.

In determining whether or not the peremptory challenge is valid, the California Legislature has guided courts to the standard of "an objectively reasonable person," and whether there is a "substantial likelihood" that they would view any of those listed characteristics as "factor[s] in the use of the peremptory challenge." *Id.* The statute defines "an objectively reasonable person" as an individual who "is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California." *Id.* Furthermore, the burden of a "substantial likelihood" implies "more than a mere possibility but less than a standard of more likely than not." *Id.* The factors that a court may utilize include those articulated in *Batson*, such as membership of a "perceived cognizable group" by either the "objecting party," "alleged victim," or "witnesses." *Id.* Other factors to be considered include a difference in questioning during voir dire between members of a "cognizable group" and non-members. *Id.*

In addition, A.B. 3070 § 231.7 lays out other reasons that are invalid for peremptory challenges, unless otherwise shown that "an objectively reasonable person would view the rationale as unrelated to the prospective juror's race, ethnicity," and other protected characteristics. *Id.* Some of these include an expression of "distrust... with law enforcement or the criminal legal system," one's neighborhood, their "ability to speak another language," and their "dress, attire, or personal appearance." *Id.*

The new legislation also shifts the burden of proof with respect to peremptory challenges. In *Batson*, the onus was on the challenging party to "establish a prima facie case of purposeful discrimination." *Batson*, 476 U.S. at 96. Indeed, "the ultimate burden of persuasion regarding racial motivation rest[ed] with, and never shift[ed] from, the opponent of the strike." *People v. Lenix,* 187 P.3d 946, 954 (Cal. 2008). Now, the California Legislature has placed the burden onto the party that is exercising the peremptory challenge, insofar as they must "state the reasons the peremptory challenge has been exercised." Code Civ. Proc., § 226 (2021). Following this, "the court evaluate[s] the reasons given," and makes an ultimate determination on whether "there is a substantial likelihood that an objectively reasonable person would view" the aforementioned characteristics as "factor[s] in the use of the peremptory challenge." *Id.* This will undoubtedly make it easier to mount a '*Batson/Wheeler* Challenge,' since the moving party's burden has been severely lessened.

Writing Samples — Laith M. Adawiya

Due to the recency of A.B. 3070 § 231.7, case law is mostly unavailable regarding the legislation. In both *People v. Battle* and *People v. Ardoin*, the California Supreme Court and the California Court of Appeals, respectively, declined to review the legislation due to it not having gone into effect yet. Ultimately, A.B. 3070 § 231.7 has served to codify the *Batson/Wheeler* precedent, as well as extend it to an unprecedented array of categories and characteristics. How this will affect voir dire from a practical perspective, however, remains to be seen.

Applicant Details

First Name	**Zartosht**
Last Name	**Ahlers**
Citizenship Status	**U. S. Citizen**
Email Address	**zartosht.ahlers@gmail.com**
Address	**Address** Street **7214 Countrywood Court** City **Springfield** State/Territory **Virginia** Zip **22151**
Contact Phone Number	**7038223095**

Applicant Education

BA/BS From	**Princeton University**
Date of BA/BS	**May 2019**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 12, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Science and Tech Law Review** **Journal of Law and Social Problems**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Harlan Fiske Stone Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Harcourt, Bernard
beh2139@columbia.edu
212-854-1997
Waxman, Matthew
mwaxma@law.columbia.edu
212-854-0592
Purdy, Jedediah
purdy@law.duke.edu
(212) 854-0593
Richman, Dan
drichm@law.columbia.edu
212-854-9370

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Zartosht Ahlers
7214 Countrywood Court
Springfield, VA 22151
(703) 822-3095
za2274@columbia.edu

June 12, 2023

The Honorable Jamal K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker,

I am a rising third-year student at Columbia Law School, where I am a Public Interest/Public Service Fellow. I write to apply for a judicial clerkship in your chambers for the 2024-25 term or a term thereafter.

I am interested in a clerkship with you given your professional background. After clerking, I am hoping to work as a federal prosecutor and am particularly interested in investigations of complex white-collar crimes—an area that I am focusing on this summer at the Money Laundering and Asset Recovery Section of the DOJ. I would be thrilled to clerk for you in light of your extensive experience in this area.

Additionally, I am keen to return to Virginia upon graduating law school. I attended middle and high-school in Virginia and worked in the area for two years after graduating undergrad.

Enclosed please find my resume, law school transcript, and a writing sample. Also enclosed are letters of recommendation from Professors Daniel Richman (drichm@columbia.edu, (212) 854-9370), Matthew Waxman (mwaxma@columbia.edu, (212) 854-0592), Bernard Harcourt (bernard.harcourt@columbia.edu, (212) 854-1997), and Jedediah Purdy (purdy@duke.law.edu, (919) 660-3952). All of my recommenders would welcome further opportunities to discuss my candidacy.

Please let me know if there is anything else I can provide to aid in your review. Thank you for your time and consideration.

Respectfully,

Zartosht Ahlers

ZARTOSHT AHLERS
703-822-3095 • za2274@columbia.edu

EDUCATION

COLUMBIA LAW SCHOOL, New York, NY
J.D., expected May 2024

Honors:	Harlan Fiske Stone Scholar, 2021-2022, 2022-2023
	Max Berger '71 Public Interest/Public Service Fellow
	John Paul Stevens Fellow
Activities:	Semi-finalist, Harlan Fiske Stone Moot Court
	Articles Editor, Science and Tech Law Review
	Research Assistant, Human Rights Clinic: East and Central Africa
	Research Assistant, Professor Bernard Harcourt
	Teaching Fellow, Professor Mala Chatterjee (Torts), Fall 2022
	Sponsored Athlete, Central Park Track Club/Tracksmith

PRINCETON UNIVERSITY, Princeton, NJ
B.A. in Politics (concentration in International Relations), received May 2019

Honors:	High Meadows Fellowship
	Peer Leadership Award
Activities:	Residential Advisor, First College
	Research Assistant to Professor Emmanuel Kreike
Independent Work:	*Effect of U.S. Border Policy on the Tohono O'odham Nation*
	ISIS' Legitimation Strategy in Raqqa
	International Silence after the Halabja Massacre

EXPERIENCE

Department of Justice, Money Laundering and Asset Recovery Section Washington, D.C.
Legal Intern June 2023 – August 2023

Surveillance Technology Oversight Project New York City, NY
Legal Intern June 2022 – August 2022
Authored a white paper on the constitutional status of geofence warrants and government location data purchases in the aftermath of *Carpenter*. Analyzed the feasibility of using copyright protection claims to limit government access to facial recognition technology. Drafted memos of support for various local laws.

The Wilderness Society Washington, D.C.
Energy and Climate Policy Fellow July 2019 – July 2021
Researched renewable energy development on public lands, issues related to environmental and Indigenous justice, and environmental deregulation. Assisted engagement with the Bureau of Land Management on land-use management plans.

Gaia Sustainable Management Institute Yangon, Myanmar
Researcher May 2018 – August 2018
Conducted research for a local peace-oriented non-profit. Conducted interviews across Myanmar, including with the spokesperson for the Kachin Independence Organization (KIO) and Internally Displaced People (IDP) on a tour through refugee camps.

American Civil Liberties Union of the Nation's Capital Washington, D.C.
Intern May 2013 – August 2013
Drafted ACLU-NCA's proposal for the 2013 D.C. Marijuana Decriminalization bill. Drafted a response to the D.C. Video Visitation Modification Act of 2013.

LANGUAGE SKILLS: German (fluent); Farsi (fluent)

Columbia Law School

Registration Services

law.columbia.edu/registration
435 West 116th Street, Box A-25
New York, NY 10027
T 212 854 2668
registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

06/02/2023 11:00:18

Program: Juris Doctor

Zartosht Ahlers

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6109-1	Criminal Investigations	Livingston, Debra A.	3.0	A-
L6241-1	Evidence	Capra, Daniel	4.0	B+
L6169-2	Legislation and Regulation	Briffault, Richard	4.0	A-
L6680-1	Moot Court Stone Honor Competition	Bernhardt, Sophia	0.0	CR
L8866-1	S. Contemporary Critical Thought II	Harcourt, Bernard E.	2.0	A
L9327-1	S. Internet and Computer Crimes	DeMarco, Joseph; Komatireddy, Saritha	2.0	A-
L6683-1	Supervised Research Paper	Richman, Daniel	1.0	A

Total Registered Points: 16.0

Total Earned Points: 16.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Richman, Daniel	3.0	A
L6425-1	Federal Courts	Metzger, Gillian	4.0	B+
L6675-1	Major Writing Credit	Richman, Daniel	0.0	CR
L6672-1	Minor Writing Credit	Bernhardt, Sophia	0.0	CR
L6680-1	Moot Court Stone Honor Competition	Bernhardt, Sophia	0.0	CR
L8866-1	S. Contemporary Critical Thought I	Harcourt, Bernard E.	1.0	A
L8951-1	S. Cybersecurity, Data Privacy and Surveillance Law	Richman, Daniel; Tannenbaum, Andrew; Waxman, Matthew C.	2.0	A
L6683-1	Supervised Research Paper	Richman, Daniel	2.0	A
L6822-1	Teaching Fellows	Chatterjee, Mala	4.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-2	Criminal Law	Seo, Sarah A.	3.0	B+
L6679-1	Foundation Year Moot Court		0.0	CR
L6474-1	Law of the Political Process	Greene, Jamal	3.0	A
L6121-28	Legal Practice Workshop II	Siegel, Jonathan	1.0	P
L6116-2	Property	Purdy, Jedediah S.	4.0	A
L6118-1	Torts	Huang, Bert	4.0	A-

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-2	Legal Methods II: Legal Theory	Purdy, Jedediah S.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-4	Civil Procedure	Sturm, Susan P.	4.0	A-
L6133-4	Constitutional Law	Ponsa-Kraus, Christina D.	4.0	B+
L6105-8	Contracts	Kraus, Jody	4.0	B+
L6113-3	Legal Methods	Harcourt, Bernard E.	1.0	CR
L6115-28	Legal Practice Workshop I	Izumo, Alice; Siegel, Jonathan	2.0	HP

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 63.0
Total Earned JD Program Points: 63.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2021-22	Harlan Fiske Stone	1L

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is with the greatest enthusiasm that I write this letter of recommendation on behalf of Zartosht Ahlers, who is applying to clerk in your chambers. Mr. Ahlers is a stand-out student who writes extremely well and is a pleasure to work with. He has very strong research skills, writes beautifully and seamlessly, and is incredibly responsive, thorough, punctual, and professional, while also being at the same time charming. I recommend him highly.

I met Mr. Ahlers when he took my Legal Methods class in his 1L year in the Fall of 2021. He was an excellent student in and out of class—always well prepared, always having something insightful to contribute to class, always sensitive to his student peers. I met with him on several occasions outside of class, and he always impressed me greatly with his thoughtfulness and intelligence.

This past year, I had Mr. Ahlers again in a small seminar in legal and political theory, and he again excelled. He wrote excellent papers, reflecting his strong research and writing skills. He was also a pleasure to work with in a small classroom setting. He is extremely mature and professional.

I offer my strongest recommendation of Zartosht Ahlers. Please do not hesitate to call me if you have any questions.

Sincerely yours,

Bernard E. Harcourt

Bernard Harcourt - beh2139@columbia.edu - 212-854-1997

June 06, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Clerkship Recommendation for Zartosht Ahlers

I highly recommend this superb clerkship candidate. His personal story as an immigrant and son of refugees is inspirational and he is an outstanding student and leader at Columbia Law School.

During the 2022 Fall semester, Zartosht was one of the very best students in my “Cybersecuri-ty, Data Privacy and Surveillance Law” seminar. His terrific research paper analyzed whether, and how, the binary search doctrine should apply to hash-value matching. Hash-value matching is a technique that informs the user of the technique whether two digital files are identical without revealing anything about the content of the files. Zartosht’s paper carefully and elegantly argued that while the use of hash-value matching to identify child sexual abuse materials was unlikely to require a warrant, the increasing prevalence of machine learning models that are able to “search” a vast majority of digital files raises concerns about the applicability of the binary search doctrine to the digital context. Throughout the semester, I could always count on Zartosht to contribute smart commentary on the week’s readings.

Zartosht is a leader in the Columbia Law School community, who brings passion and thoughtfulness—as well as an infectious good humor—to all his pursuits. He was awarded a John Paul Stevens Fellowship for his 1L summer and was named a Harlan Fiske Stone Scholar for his elite 1L academic performance. During his second year, Zartosht was a semi-finalist at the Harlan Fiske Stone Moot Court Competition, Columbia Law School’s annual moot court competition. Testifying to the high regard in which his peers hold him, Zartosht is also an incoming articles editor for the Science and Tech Law Review. He is a great pleasure to work with and would make a terrific member of any chambers team.

Motivated heavily by his upbringing as the son of a refugee from Iran, and an immigrant (in his early teens) himself, Zartosht is deeply committed to a public interest/service career. He is the recipient of a Max Berger ’71 Public Interest/Public Service Fellowship, thereby pledging himself to pursuing a career in the public sector immediately upon graduation. He has been making the most of his law school summers, working for advocacy organizations and the Department of Justice on cutting-edge issues at the intersection of law and technology.

This is an outstanding candidate. I highly recommend him.

Sincerely,

Matthew Waxman
Liviu Librescu Professor of Law
Faculty Chair of the National Security Law Program

Matthew Waxman - mwaxma@law.columbia.edu - 212-854-0592

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am genuinely delighted to recommend Zartosht Ahlers for a clerkship in your chambers. He's a very special person—one of my favorite students from the several years I spent on the faculty at Columbia, and, indeed, of all my nearly 20 years of teaching. I think you'll be very pleased if you hire him: he'll do excellent work and you'll be glad to know him for the rest of your life.

Zartosht stood out from the beginning in Property as a student willing to speak forcefully on hard questions. He brought evident passion to questions of fairness in the law, voicing deep feeling for the plight of those who, for instance, have no property in a system of private ownership yet still need a place to go. He came to my office hours to discuss all sorts of questions, some connected with property law, others quite distinct: What can a democracy do about pernicious misinformation online? Why isn't the subway free to use? I had the impression of a mind constantly alight with ideas.

With the most impassioned students, the question is always whether they can deliver. Zartosht's exam showed that he can. He earned an A in my course and could easily have been one of the tiny handful of students to whom I am allowed to award an A+. He is as analytically acute and doctrinally sure-footed as he is creative and energetic. Had I been staying at Columbia (rather than returning, for family reasons, to Duke), I would certainly have asked him to serve as a teaching assistant, a high honor for Columbia students.

I've since learned more about Zartosht. His energy is extraordinary. This is a young person who, a week before his 1L fall exams, ran a 15K race in under 50 minutes, and a year earlier ran a half-marathon in under 70 minutes. During his 1L year he was running 80-90 miles per week and was a "sponsored runner" in the Central Park Track Club. (This means he had a corporate sponsor, the running brand Tracksmith.) Before law school, while working at the Wilderness Society, he found opportunities to take 24-hour hikes (hiking all night) along with intensive rock-climbing and trail-running. None of this seems to detract from his academic performance; nonetheless, in a sign of his priorities, he has stepped back from competitive running in his second year to concentrate on his studies.

His personal story is also remarkable. He's the son of an Iranian political refugee father and a German mother, who still speaks a different language with each parent (and is himself fluent in both Farsi and German as well as English). He spent his first 13 years in fairly real poverty in Germany, when his father worked a variety of menial jobs to support the family and kept up pro-democracy work in the Iranian diaspora. Zartosht tells me that his father is disillusioned by the lifelong disappointment of his political efforts, but Zartosht admires his father's commitment and hopes to do meaningful pro-democracy work himself.

I really can't overstate what a fine person Zartosht is—super-smart, impassioned, with boundless energy. Much of this will be apparent as soon as you meet him. Please let me assure you that he has the analytic focus and work ethic to go with his more overt strengths. I think he'll make a splendid clerk and I hope you'll decide to hire him.

Sincerely yours,

Jedediah Purdy
Raphael Lemkin Professor of Law

Jedediah Purdy - purdy@law.duke.edu - (212) 854-0593

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Zartosht Ahlers

Dear Judge Walker:

I write to enthusiastically support the application of Zartosht Ahlers – a Columbia Law School 3L (class of 2024) – to clerk in your chambers. He's flat-out terrific, with an extraordinary personal story, and I think you'd like him a lot.

I got to know Zartosht in his 1L year when I became his faculty mentor as part of the Public Interest/Public Service Fellowship he had been awarded. It was a pleasure to work with him from the very start, because of his infectious good humor, keen intelligence, maturity, breadth of interests, and enormous commitment to public interest and public service work.

By Zartosht's 2L year, I became extraordinarily familiar with his work, as he asked me to supervise his Note for the Science and Tech Law Review and also aced both my Criminal Adjudication class and the Cybersecurity, Data Privacy, and Surveillance Law seminar that I teach with my colleagues Matt Waxman and Andrew Tannenbaum.

Zartosht's work on his Note has been extraordinarily impressive. Unlike so many students, he came in with a plan and executed it beautifully, with his characteristic sharp intellect and refusal to accept the mushy analyses of others. Courts around the country, both federal and state, are increasingly confronted with Government applications for geofence warrants – warrants, generally directed at Google – that seek to identify devices (usually cellphones) present near a particular location at a particular time (usually a crime scene). In the face of the doctrinal uncertainties created by Carpenter v. United States, risk-averse law enforcement authorities have worked with Google to devise procedures for these reverse location searches that narrow down the scope of information the Government obtains via such warrants, procedures that a growing number of courts have accepted and/or modified. The collaborative development of these procedures, however, means that some basic aspects of geofence warrants have gone underexplored: what exactly does the Fourth Amendment require? Policy aside, do cellphone users really have a reasonable expectation of privacy in the anonymized data that Google currently hands over as an initial step of its geofence procedure? And once the Government gets anonymized location data for a particular device, why can't it simply use a subpoena to deanonymize a particular device?

Zartosht's readiness to ask and answer these basic questions – going to first constitutional principles -- brings a breadth of fresh air to the labored doctrinal discussions, shaped by the Google procedures that dominate the field. His cutting analysis and crystal-clear prose have been a pleasure to read as he has pushed through the paper. He responded to criticism with speed and was particularly impressive when he restructured the paper to conform to analytical changes.

Meanwhile, while working on his Note and taking a heavier courseload than most of his peers, Zartosht was a standout participant in my Criminal Adjudication class – regularly contributing invariably smart comments and writing a terrific exam. He was also an exceptional contributor to my Cybersecurity seminar, bringing a technical sophistication and sense of doctrinal nuance to bear on every topic. His final paper offered a wonderful example of both, drawing on binary search doctrine to argue that the Fourth Amendment does not require a warrant when hash-value matching is used to search for Child Sexual Abuse Material that has known "digital fingerprints" (hash values). Once again, the clarity and power of the analysis, and its readiness to concede weaknesses, was impressive indeed, as was the graceful prose.

As Zartosht's performance in the classes he took with me was invariably top-notched, I was surprised by some of his other grades – absolutely fine, but not superlative. I've no grand explanation, but would not be surprised if his grades only improve.

Zartosht's minimalist resolution of the geofence issue; his cyber seminar paper, and many of his comments during that seminar left me a bit confused. I knew his extensive public interest background – marijuana decriminalization work for the ACLU; refugee work for the Gaia Sustainable Management Institute; two years as an energy and climate policy fellow at the Wilderness Society, and most relevantly, an internship at the Surveillance Technology Oversight Project – yet he regularly advanced legal positions that, while careful and nuanced, were quite accommodating of law enforcement interests.

It wasn't that Zartosht had held back at the Oversight Project. Indeed, at my request, David Siffert, his supervisor there (and also a clinical adjunct at NYU Law), wrote me:

Zartosht was easily one of the best interns the Surveillance Technology Oversight Project has had during my time there. Zartosht's research and writing skills were excellent, and he was both responsible and extremely well-liked. But what really set Zartosht apart was his enthusiasm for the work. Zartosht threw himself into his projects with a sense of careful excitement, soaking up so much information that he was able to educate the entire STOP team about countless important legal issues. It was

a pleasure to work with Zartosht, and a pleasure to learn from him. As a former clerk on both a federal trial court (SDNY) and state high court (NY Court of Appeals), I am confident that Zartosht's interest in legal and factual issues, alongside his research and writing skills, will set him apart as an excellent law clerk.

Zartosht made everything clear when I asked him to reconcile his diverse commitments. His father, a political activist in Iran, fled that country in the wake of the Islamic Revolution and settled in one of the poorest neighborhoods in Berlin, where Zartosht grew up until, at thirteen, his parents brought him to the US for a better life. He has explained:

My father often portrays his own life as a cautionary tale, offering it to discourage me from pursuing a public service career. He reminds me of our families' financial difficulties and how his four decades of activism have done little to improve the lives of his Iranian co-patriots or allow him any
professional success.

But I have never seen my fathers' career like that. I admire my father because he does the right thing for no other reason than because it's the right thing to do. I aspire to have a career like my father's—not a career of success or accolades, but one lived with integrity. I aspire to have the personal strength to make the decisions that align with my beliefs, even if it might result in a career
that doesn't unfold to its full potential.

Zartosht learned English and ended up at Princeton, where, in addition to studying International Relations he "fell in love with America's public lands." That led to his post-graduate work at The Wilderness Society, where among other things he learned about governance:

At the end of the planning process for a specific region, the Department of Interior would publish a Resource Management Plan (RMP). While I came to TWS aspiring to throw unyielding blockades in the path of developers, I was much prouder of the resulting compromises: the RMP had undergone a complex process, received input from all stakeholders, and found a solution that was not ideal for any individual stakeholder but purported to best meet the needs of our pluralist society. I began to see the RMP as the product of our democracy in action.

He had a similar epiphany when working at STOP during his 1L summer, where he found a strategy focusing on impeding the enforcement of statutes enacted after a democratic process to be the antithesis of the collaborative and pluralist approach of his work at The Wilderness Society. And he arrived at a new goal:

By the end of my internship at STOP, I realized I wanted to work as a prosecutor. My work at TWS and the lessons I drew from my father's experiences with the Iranian Revolution led me to conclude that I wanted to work in a career that allowed me to effectuate stable change in society in a way that simultaneously strengthened our democratic institutions, not by putting limits on the power of these institutions. At the same time, I aspired to hold antisocial actors accountable for their self-serving behavior.

I think Zartosht will be a wonderful prosecutor and will do what I can to help him toward that goal. He has the personal integrity, keen intelligence, and intellectual humility that, combined with his antipathy to illegitimate exercises of power and his open personality make him the perfect candidate.

Personally, Zartosht is self-effacing, good humored and great company. Bottom line is that this is super-smart, hypercompetent, young lawyer with a capacious intellect and extraordinary writing skills who would be an absolute pleasure to work with and would be a spectacular law clerk.

Respectfully,

Daniel Richman

Dan Richman - drichm@law.columbia.edu - 212-854-9370

ZARTOSHT AHLERS
(703) 822-3095 • za2274@columbia.edu

Writing Sample

The following writing sample is a brief submitted to the semi-final round of the 2022-23 Harlan Fiske Stone Moot Court Competition, Columbia Law School's annual school-wide moot court competition. It has been minimally edited by my co-counsel, who briefed and argued a different issue.

The competition was based on a hypothetical scenario in which defendant, William Joseph Wood, was prosecuted in a federal district court for assault committed on a tribal reservation. The jurisdiction of the federal court was based, in part, on Wood's status as an 'Indian' under the Major Crimes Act, 18 U.S.C. § 1153.

On appeal, Wood, among other issues, challenged the district court's jury instruction for determining whether a criminal defendant should be considered an 'Indian' under the Major Crimes Act. I argued this issue while my co-counsel argued a separate issue pertaining to Wood's subsequent sentencing.

The district court below instructed the jury as follows:

> [T]he government must prove each of the following elements beyond a reasonable doubt . . . [that] the defendant is an Indian under Section 1153 of Title 18 of the United States Code. For the defendant to be found to be an Indian, the government must prove each of the following elements beyond a reasonable doubt:
>
> 1. that the defendant is descended from indigenous American ancestors; and
> 2. that the defendant was affiliated with a federally recognized tribe at or around the time of the offense.

The issue is on appeal in the United States Court of Appeals for the Sixth Circuit. Parties prepared briefs addressing "the proper standard for determining whether a criminal defendant should be considered an 'Indian' under the Major Crimes Act, 18 U.S.C. § 1153, and [whether] the district court's jury instructions adequately reflect that proper standard[.]"

I argued on behalf of defendant William Joseph Wood as appellant.

ISSUE 1: MAJOR CRIMES ACT

I. BACKGROUND

Over the objections of both parties, R. at 16, the district court judge below, the Honorable Atticus Silverstein, instructed the jury with, in the words of the prosecution, a "threadbare," R. at 17, test for deciding whether the Defendant, William Joseph Wood, was an Indian at the time of the offense under the Major Crimes Act (MCA). Judge Silverstein told the jury that "[f]or the defendant to be found to be an Indian, the government must prove . . . First, that the defendant is descended from indigenous American ancestors; and Second, that the defendant was affiliated with a federally recognized tribe at or around the time of the offense." R. at 21.

These jury instructions have never been used by another court because they run afoul of the Equal Protection Clause, the text of the statute, and Congress' explicit intent. We urge this Court to reverse.

II. STANDARD OF REVIEW

"If a party preserves an objection to a jury instruction," the Sixth Circuit "review[s] the instruction to see whether the charge, taken as a whole, fairly and adequately submits the issues and applicable law to the jury." United States v. Hendrickson, 822 F.3d 812, 818 (6th Cir. 2016). "The accuracy of jury instructions is a question of law, which we review de novo." Id.

However, objections to jury instructions must be preserved. Preserving an objection requires a defendant to "inform the court . . . [of the] objection . . . and the grounds for that objection." Fed. R. Crim. P. 51. The defendant must "object with that reasonable degree of specificity which would have adequately apprised the trial court of the true basis for his objection." United States v. LeBlanc, 612 F.2d 1012, 1014 (6th Cir. 1980) (quoting United States v. Fendley, 522 F.2d 181, 186 (5th Cir. 1975)). This "provides the district court with an opportunity to address the error in the first instance

and allows this court to engage in more meaningful review." United States v. Bostic, 371 F.3d 865, 871 (6th Cir. 2004).

Where an error has been made, the "government bears the burden to prove that any error was harmless." United States v. Newsom, 452 F.3d 593, 602 (6th Cir. 2006). An error is harmless only "when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." United States v. Baldwin, 418 F.3d 575, 582 (6th Cir. 2005). In this analysis, "harmless-error review looks . . . to the basis on which the jury actually rested its verdict." Sullivan v. Louisiana, 508 U.S. 275, 279 (1993).

Even where an error does *not* affect the verdict, the Supreme Court has recognized that "some errors should not be deemed harmless." Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017). These errors are called 'structural errors,' and when they occur, "the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.'" Id. at 1910. One type of structural error is where trial error deprives the defendant of a "right [that] is not designed to protect the defendant from erroneous conviction but instead protects some other interest." Id. at 1908.

III. THE JURY INSTRUCTIONS VIOLATE THE EQUAL PROTECTION CLAUSE

A. Background

Absent narrow tailoring to satisfy a compelling government interest, the Equal Protection Clause forbids the use of race as a factor for differential treatment. See, e.g., Brown v. Bd. of Educ., 349 U.S. 294 (1955). This is true even if race is considered alongside other permissible factors. See, e.g., Gratz v. Bollinger, 539 U.S. 244 (2003).

However, in Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court articulated a narrow exception to this rule that allows for government action pertaining to Indian tribes. This narrow exception stems directly from the "centuries-old nation-to-nation political relationship"

between the Federal Government and the Indian tribes. Brackeen v. Haaland, 994 F.3d 249, 281 (5th Cir. 2021). Federally recognized tribes have a "unique legal status . . . under federal law" based on "a history of treaties" and Congress's "assumption of a 'guardian-ward' status," enshrined in Article I, Section 8, Clause 3, and Article II, Section 2, Clause 2, of the U.S. Constitution. Mancari, 417 U.S. at 551–52.

Consider the Supreme Court's opinion in United States v. Rogers, 45 U.S. 567 (1846), which has often served as a touchstone in defining what it means to be 'Indian.' In Rogers, the Court found that for an individual to be an Indian, it was not enough to be a "citizen of the Cherokee nation" if the individual did not have Indian blood. Id. at 568, 573. Therefore, Rogers "was still a white man, of the white race, and therefore not within the exception in the act of Congress." Id. Ever since, courts, see, e.g., United States v. Prentiss, 273 F.3d 1277, 1283 (10th Cir. 2001), legislative bodies, see, e.g., 25 U.S.C. § 5129, and agencies, see, e.g., 44 BIAM 335, 3.1, have distilled the reasoning in Rogers into a two-part test that broadly requires that an individual "(1) has some Indian blood," see, e.g., Prentiss, 273 F.3d at 1283; and (2) is either "recognized as an Indian by a tribe or the federal government," see, e.g., id., or is "a member of a Federally-recognized Indian tribe," see, e.g., 44 BIAM 335, 3.1.

Of course, as the Supreme Court observed in Mancari, the widespread adoption of some form of the Rogers test means "every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations." Mancari, 417 U.S. at 552. In any other context, this would constitute an impermissible racial classification. For instance, various formulations of the Rogers test look to whether an individual has "some Indian blood," but no statute could permissibly distinguish between individuals based on whether one of them has "some [Asian] blood."

According to Mancari, this discrepancy is justified because a blood quantum requirement is necessary for the government to meet the "enduring obligations [it] owes to the Indians," Brackeen, 994 F.3d at 281, while limiting the number of people who can claim benefits. See Paul Spruhan, A Legal History of Blood Quantum in Federal Indian Law to 1935, 51 S.D. L. REV. 1 (2006). In the words of the Mancari Court, the unique "legal relationship between the Federal Government," Mancari, 417 U.S. at 550, and "quasi-sovereign" federally recognized tribes, id. at 554, means the Federal Government may use a racial factor (such as a blood quantum) to identify Indians for differential treatment. The use of an otherwise impermissible test is constitutionally permitted because it is directly tied to the accomplishment of the "solemn commitment of the Government toward the Indians." Id. at 552.

This does not mean any classification of Indians is permissible. Mancari makes clear that a constitutionally permissible distinction must be "political rather than racial in nature," Mancari, 417 U.S. at 554 n.24, and be "reasonably and directly related to a legitimate, nonracially based goal," id. at 554, to fall under this "narrow," id. at 548, exception to typical Equal Protection Clause analysis. Otherwise, a classification of Indians would not further the unique ends which justify the exception. So, Rogers's two-part test, which includes a racial element, is permissible, but only so long as the second prong ensures that the test as a whole inquires into an individual's political status as an Indian.

B. Which Classifications Are Permissibly Political In Nature?

The *only* construction of a classification of Indians that the Supreme Court has definitively approved as 'political,' and thereby constitutionally permissible, has inquired whether an individual is a member of a federally recognized tribe. See Mancari, 417 U.S. at 554 ("The preference . . . applie[d] only to members of 'federally recognized' tribes."); Fisher v. Dist. Ct. of Sixteenth Jud. Dist. of Montana, 424 U.S. 382, 387 (1976) (upholding Northern Cheyenne Tribe's establishment of

Tribal Court that granted it jurisdiction over adoptions "among members of the Northern Cheyenne Tribe"); Washington v. Wash. State Com. Passenger Fishing Vessel, 443 U.S. 658, 689 (1979) (allowing steelhead quota for "members of the Indian tribes" that have treaty with federal government).

Particularly germane to Wood's case is United States v. Antelope, where the Supreme Court upheld the constitutionality of the MCA against an equal protection challenge for "subjecting individuals to federal prosecution by virtue of their status as Indians." 430 U.S. 641, 642 (1977). The Court permitted the differential treatment of Indians by the MCA because "respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are *enrolled members* of the Coeur d'Alene Tribe." Id. at 646 (emphasis added). As such, the Court explained that the classification was "rooted in the unique status of Indians as 'a separate people' with their own *political* institutions." Id. (emphasis added).

In contrast, the Court struck down a statute that gave preference for native Hawaiians, even while recognizing that the Federal Government has a "a guardian-ward relationship with the native Hawaiians . . . analogous to the relationship between the United States and the Indian tribes." Rice v. Cayetano, 528 U.S. 495, 511 (2000). Rice deemed the statute impermissible on equal protection grounds because the statute applied to "those persons who are descendants of people inhabiting the Hawaiian Islands in 1778." Id. at 499. Finding that ancestry was "a proxy for race," id. at 514, the Court distinguished Mancari, where "although the classification [also] had a racial component," id. at 519, it extended "only to members of 'federally recognized' tribes," id. at 519–20 (quoting Mancari, 417 U.S. at 553 n.24). The Court concluded that Mancari could not be extended to permit for the classification "of tribal Indians," Rice, 528 U.S. at 520, absent an inquiry into political status.

It is important to note that we are not arguing that 'membership' is necessarily the *only* permissible formulation of the second prong that makes the entire test constitutionally permissible.

Perhaps inquiring whether the individual has been 'recognized' as an Indian by the tribe or by the federal government is a sufficiently political classification. As Antelope explains, "enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction." 430 U.S. at 647 n.7. We argue only that Mancari and Rice require an exclusively political classification. The jury instructions of the district court judge below fail this requirement.

C. Inquiring Into An Individual's 'Affiliation' With A Federally Recognized Tribe Fails This Requirement

Judge Silverstein instructed the jury that "[f]or the defendant to be found to be an Indian, the government must prove . . . First, that the defendant is descended from indigenous American ancestors; and Second, that the defendant was affiliated with a federally recognized tribe at or around the time of the offense." R. at 21.

The first prong of these instructions is a racial test. So, for the jury instructions as a whole to be permissible, the second prong must be a classification "derive[d] from the quasi-sovereign status of [a federally recognized tribe] under federal law." Fisher, 424 U.S. at 390. Only then is the classification "political rather than racial in nature," Mancari, 417 U.S. at 554, and thereby acceptable given the unique constitutional status of federally recognized tribes.

Requiring an individual to be 'affiliated with a federally recognized tribe' fails to turn this classification into a permissible political classification. Affiliated is defined as "closely associated with another typically in a dependent or subordinate position." Affiliated, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/affiliated (last visited Jan. 22, 2023). However, one can be closely associated with a federally recognized tribe without being a member of that political sovereign in any sense.

For instance, 'affiliation' can be established through racial status alone. A jury could reasonably conclude that an individual whose parents were members of a tribe is 'closely associated' with that tribe—even if that individual has no other attachment to that tribe.

Moreover, 'affiliation' can also be established through relationships that are not political. A jury could reasonably conclude that an individual is 'closely associated' with a tribe if that individual works for a tribal casino—even though that sort of professional relationship is not of the political nature required by Mancari.

An individual might even be considered 'closely associated' with a tribe after publicly denouncing their relationship with the tribe, publicly severing all tribal relations, and writing an op-ed on how 'the tribe does not represent [them] politically because of irreconcilable political differences.' After all, that individual has a history with that tribe, and a negative association can still count as a 'close association.'

These illustrations show that inquiring into whether an individual is 'affiliated' with a tribe does not make the classification Judge Silverstein used 'political.' As a result, the jury instructions were constitutionally deficient.

D. The Defendant Objected To These Instructions Below

In the court below, the Defense objected that "any requirement . . . that the jury make a factual finding as to the defendant's racial ancestry is clearly in violation of equal protection doctrine." R. at 21. The trial court was thereby "apprised . . . of the true basis for [the Defense's] objection." LeBlanc, 612 F.2d at 1014.

E. The District Court's Error Requires Reversal

Judge Silverstein's jury instructions impermissibly violated William Wood's equal protection rights. This error is 'structural' and requires automatic reversal, because equal protection rights are

"not designed to protect the defendant from erroneous conviction but instead protects some other interest." Weaver, 137 S. Ct. at 1908).

In Batson v. Kentucky, the Supreme Court explained that "the harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." 476 U.S. 79, 87 (1986). In much the same way, the taint of discriminatory jury instructions extends beyond the result of the trial, impacting the entire community.

However, even if this error was not structural, to avoid reversal the Government must show that the guilty verdict rendered in *this* trial was undoubtedly unattributable to the district court judge's error. Sullivan, 508 U.S. at 279. No such showing is possible. The jury was *not* instructed to make a finding whether Wood had the political status of an Indian, and the record is at *best* inconclusive on this point. Wood was not enrolled in, or a member of, a federally recognized tribe. R. at 35. In fact, the Saginaw Chippewa Indian Tribe of Michigan had taken explicit steps to sever Wood's tribal citizenship. R. at 22. According to the tribe's constitution, such disenrollment action eliminated *any* rights of membership. R. at 25. Given these circumstances, it cannot be said that "the elements of guilt that the jury *did* find necessarily embraced the one . . . misdescribed." Neder v. United States, 527 U.S. 1, 35 (1999) (Scalia, J., concurring). We therefore urge reversal.

IV. THE JURY INSTRUCTION IS AN INCORRECT STATEMENT OF THE LAW

Even if the jury instructions do not violate the Equal Protection Clause, Judge Silverstein committed reversible error by instructing the jury that the Government must prove that "the defendant was *affiliated* with a federally recognized tribe, at or *around the time* of the offense," R. at 21 (emphasis added), since these instructions are not consistent with the meaning of 18 U.S.C. § 1153.

A. 'Affiliation' Is Broader Than What Congress Intended

Although Chapter 53 of Section 18 of the U.S. Code defines 'Indian country,' see 18 U.S.C. § 1151, the MCA leaves the word 'Indian' undefined. In the absence of a statutory definition, all

circuits that have attempted to define 'Indian' have relied on a two-part test derived from Rogers, which broadly inquires whether an individual "(1) has some Indian blood; and (2) is recognized as an Indian by a tribe or by the federal government." See, e.g., Prentiss, 273 F.3d at 1283.

Neither party disputes the use of this general two-part test—it is historically grounded, widely used to ascertain whether an individual falls under the jurisdiction of the MCA, and Congress has likely acquiesced to its use. What *is* disputed is Judge Silverstein's phrasing of the second prong, which asks whether "the defendant was affiliated with a federally recognized tribe, at or around the time of the offense." R. at 21. This prong was objected to by both sides at the jury instruction conference. R. at 17–18.

In considering how Judge Silverstein should have articulated the jury instructions' second prong, considering the legislative history of a different law sheds some light. Title 25 U.S.C., Section 1301 of the U.S. Code defines 'Indian' as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18 [the MCA]." § 1301(4). In other words, Section 1301 adopts the MCA's definition of Indian.

After introducing legislation to "make [§ 1301] permanent," 137 CONG. REC. 23,673 (1991), Senator Daniel Inouye, then-Chairman of the Senate Committee on Indian Affairs, see Hawaii, U.S. SENATE, https://www.senate.gov/states/HI/timeline.shtml (last visited Jan. 22, 2023), explained how he interpreted the definition of 'Indian' in Section 1153: "[T]he term 'Indian' as used in Federal Indian law denotes a political relationship based on a person's membership in an Indian tribe . . . a person charged [under § 1153] as Indian [must] be actually enrolled in a tribe." 137 CONG. REC. 23,673. If "such status is contested," other factors may be considered: whether the "defendant is recognized as an Indian by his tribe[,] . . . [whether] the defendant has . . . enroll[ed] or [is] seeking to enroll in an Indian tribe, and by availing himself of services available to Indians because of their status of Indians." Id. In other words, Senator Inouye read the MCA as requiring either membership

in a federally recognized tribe, or, alternatively, recognition as an Indian by the tribe or the federal government.

Senator Inouye's understanding of how the MCA defines 'Indian' helps explain Congress's acquiescence to how federal courts approach 'Indian' under the MCA. Indeed, every circuit that has addressed the definition of 'Indian' under the MCA has framed the second prong in some variation of "recognition as an Indian by the tribe or by the federal government." See United States v. Torres, 733 F.2d 449, 456 (7th Cir. 1984) ("recognized as an Indian by the Indian tribe and/or the Federal government"); United States v. Rainbow, 813 F.3d 1097, 1102 (8th Cir. 2016) ("is recognized as an Indian by an Indian tribe and/or the federal government"); United States v. Zepeda, 792 F.3d 1103, 1106–07 (9th Cir. 2015) ("the defendant's tribal or government recognition as an Indian") Prentiss, 273 F.3d at 1280 ("is recognized as an Indian by a tribe or by the federal government").

In fact, since 1977, when a federal circuit court first adopted the two-part test as the definition for Indian under the MCA, see United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976) ("recognition by a tribe or society of Indians or by the federal government"), *every* court that has defined 'Indian' in the context of the MCA has formulated the second prong as a variant of 'recognition.' If Congress thought this interpretation was unfaithful to the meaning of the MCA, one would expect them to have intervened. However, Senator Inouye's perspective indicates that Congress has acquiesced to this formulation because Congress thinks it is accurate.

Judge Silverstein's language of 'affiliated with' is a notable departure from 'recognized as an Indian by the tribe or by the federal government.' 'Recognize' can be defined as "to acknowledge formally. . . [or] to admit as being of a particular status." Recognize, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/recognize (last visited Jan. 22, 2023). As such, an individual might be 'affiliated' with an Indian tribe by working at the tribe's casino without ever being 'recognized as' an Indian.

It must be acknowledged that some Ninth Circuit cases confusingly use the word 'affiliated' in their reasoning. However, the Ninth Circuit *never* instructs the jury to simply inquire whether an individual 'is affiliated with' an Indian tribe as Judge Silverstein did here. The Ninth Circuit's Model Criminal Jury Instructions ask the jury to determine whether an individual

> was a member of, or affiliated with, a federally recognized tribe, . . . by considering four factors, in declining order of importance . . . (1) Enrollment in a federally recognized tribe; (2) Government recognition . . . through receipt of assistance reserved only to individuals who are members, or are eligible to become members, of federally recognized tribes; (3) Enjoyment of the benefits of affiliation with a federally recognized tribe; and (4) Social recognition as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a federally recognized tribe.

MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 543 (2022). True enough, the fourth of these factors uses the word 'affiliated.' However, this factor considers affiliation only insofar as it contributes to 'social recognition.' Even to that extent, affiliation is the least of four distinct factors. No Ninth Circuit opinion has ever suggested that 'affiliation' alone satisfies the MCA's second prong.

Given the unanimity of circuits and the acquiescence of Congress, the second prong of Judge Silverstein's jury instructions were plainly inaccurate. There are many permissible ways to articulate a test about 'recognition,' but 'affiliation' represents a distinctly broader concept that is not faithful to the meaning of the MCA.

B. 'Around the time' is an unbridled judicial invention

Citing no legal authority or logical basis, Judge Silverstein told the jury that the government must prove that "the defendant was affiliated with a federally recognized tribe, at or *around the time* of the offense." R. at 21 (emphasis added). However, the MCA applies to "[a]ny Indian who commits

. . . [a covered offense]." § 1153. This statutory text gives no indication of including individuals who were Indians 'at or around the time' they committed the offense.

In this regard, Judge Silverstein's instructions are also inconsistent with the Supreme Court's pronouncement that "members of tribes whose official status has been terminated by congressional enactment *are no longer subject*, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act." Antelope, 430 U.S. at 647 (emphasis added). For instance, if a tribe's official status is terminated 'around the time' of an offense, Judge Silverstein's jury instructions would call for federal criminal jurisdiction even though Antelope makes clear that such an individual is "no longer subject to federal criminal jurisdiction." Id.

Still, the *most* serious problem with Judge Silverstein's 'around the time' language is that it is impermissibly vague. How long is 'around?' One month or one year? Congress could not possibly have intended the MCA to be so unclear as to when it applies. As the Ninth Circuit has explained,

> In a prosecution under the []MCA, the government must prove that the defendant was an Indian at the time of the offense with which [they were] charged. If the relevant time for determining Indian status were earlier or later, a defendant could not "predict with certainty" the consequences of his crime at the time he commits it. . . . This would . . . undermine the "notice function" we expect criminal laws to serve.

Zepeda, 792 F.3d at 1113 (citing Apprendi v. New Jersey, 530 U.S. 466, 478 (2000)).

This principle explains why Judge Silverstein's 'around the time' language is not used in *any* jury instructions—MCA or otherwise. The Sixth Circuit's Model Jury Instructions use 'around the time' in zero instructions, while using 'at the time' in 20 instructions. SIXTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTION COMMITTEE (2021). In fact, *no* model jury instruction in *any* circuit (that publishes their jury instructions online) uses 'around the time.' See PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT (2015); PATTERN JURY INSTRUCTIONS (CRIMINAL) FOR THE FIFTH CIRCUIT (2019); PATTERN CRIMINAL JURY

INSTRUCTIONS OF THE SEVENTH CIRCUIT (2012); EIGHTH CIRCUIT MODEL JURY INSTRUCTIONS (2021); MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT (2022); CRIMINAL PATTERN JURY INSTRUCTIONS FOR THE TENTH CIRCUIT (2021); ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS, CRIMINAL CASES (2022). Combined, the published federal circuit model jury instructions use 'around the time' in zero instructions, but use 'at the time' in 502 instructions. This Circuit should not endorse such unprecedented and vague language absent clear guidance from Congress.

C. Defendant Objected To These Instructions Below

In the court below, the Defense objected that "the word 'affiliation' does not adequately capture the language of the statute, which requires on a plain reading that the defendant actually be an 'Indian' rather than merely be affiliated with Indian tribes." R. at 18. This apprised Judge Silverstein that his use of 'affiliated with' was improper.

The Defense also urged Judge Silverstein to replace the second prong of his instructions with one that asks whether the defendant "*is* enrolled with a federally recognized tribe." R. at 18 (emphasis added). This proposed instruction put Judge Silverstein on notice that the Defense objected to his use of 'around the time.'

Even the Prosecution "urge[d] the court to adjust its jury instructions to conform more closely with those found in the Ninth Circuit's Manual of Model Criminal Jury Instructions and endorsed in United States v. Zepeda." R. at 17. The Ninth Circuit's Model Criminal Jury Instructions require the defendant to be a member of a federally recognized tribe "at the time of the offense." MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 543 (2022). This too put Judge Silverstein on notice that 'around the time' was an improper instruction.

Judge Silverstein was thus "apprised" of the parties' objections with 'affiliated with' and 'at or around the time.' LeBlanc, 612 F.2d at 1014. Therefore, this Court reviews the accuracy of the jury instructions de novo. Hendrickson, 822 F.3d at 818.

D. Harmless Error

To avoid reversal, the Government must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Baldwin, 418 F.3d at 582.

However, at the time of the offense, Wood was not enrolled in, or a member of, a federally recognized tribe. R. at 35. At the time of the offense, Wood was not recognized as an Indian by the tribe or by the federal government. Baldwin, 418 F.3d at 582. At the time of the offense, Wood did not enjoy government benefits because of an affiliation with a federally recognized tribe. Id. At the time of the offense, Wood did not live on the reservation. Id. At the time of the offense, Wood was "not entitled to share any subsequent rights of membership." R. at 25.

It may be true that *around* the time of the offense, Wood was *affiliated* with a federally recognized tribe. R. at 35. But given this case's undisputed facts, it is quite likely that the error in Judge Silverstein's instructions "contribute[d] to the verdict obtained." Baldwin, 418 F.3d at 582.

V. CONCLUSION

In the absence of relevant Sixth Circuit precedent, the district court judge presented the jury with a set of jury instructions never used and untested by any court. These jury instructions violated the Equal Protection Clause by asking the jury to determine whether Wood was of the Indian race, rather than of Indian political status. Additionally, the jury instructions ran afoul of the plain text of the statute and were impermissibly vague.

The integrity of the judicial system requires that the Defendant receive a new trial. We strongly urge the judge to reverse.

Applicant Details

First Name	**Sarah**
Last Name	**Al-Shalash**
Citizenship Status	**U. S. Citizen**
Email Address	**sa3992@columbia.edu**
Address	**Address** Street **419 W 119th Street, 8C1** City **New York** State/Territory **New York** Zip **10027** Country **United States**
Contact Phone Number	**2144712150**
Other Phone Number	**2144712150**

Applicant Education

BA/BS From	**Yale University**
Date of BA/BS	**May 2019**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Science and Technology Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Emens, Elizabeth
eemens@law.columbia.edu
212-854-8879

Greene, Jamal
jamal.greene@law.columbia.edu
212-854-5865

Richman, Dan
drichm@law.columbia.edu
212-854-9370

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Sarah Al-Shalash
419 W 119th Street, 8C1
New York, NY 10027
214-471-2150

June 12, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year student, a James Kent Scholar, and a Public Interest/Public Service Fellow at Columbia Law School. I am also the Executive Articles Editor of the *Science and Technology Law Review*. I write to apply for a clerkship in your chambers beginning in 2024, or for any term thereafter. As a student committed to a career in service of the public interest, I hope to use my clerkship to become a more effective advocate for the communities I serve. I believe your mentorship will allow me to do just that.

I also believe I would excel as your clerk. I have long enjoyed legal research and writing, and I've honed that enjoyment into a skill as a legal research assistant, a litigation intern at the ACLU, and a member of the *Science and Technology Law Review*. I take pride in being a warm and collaborative colleague, a trait that I found universally useful in my professional life prior to law school. I am disciplined, attentive, and ever-curious. I hope to bring these qualities to bear in my work in your chambers.

Enclosed please find a resume, transcript, and writing sample. Also enclosed are letters of recommendation from Professor Jamal Greene (jamal.greene@law.columbia.edu), Professor Elizabeth Emens (eemens@law.columbia.edu), and Professor Daniel Richman (drichm@law.columbia.edu). Thank you for your time and consideration of my candidacy.

Respectfully,

Sarah Al-Shalash

SARAH AL-SHALASH

419 West 119th Street, Apt. 8C1, New York, NY 10027
214-471-2150 • sarah.al-shalash@columbia.edu

EDUCATION

COLUMBIA LAW SCHOOL, New York, NY
J.D., expected May 2024
Honors: Public Interest/Public Sector Fellow, James Kent Scholar, Harlan Fiske Stone Scholar
Activities: Columbia Science and Technology Law Review (Executive Articles Editor), CLS Legal Tech Association (Public Interest Events Chair), Academic Coach, Research Assistant to Professor Elizabeth Emens, Research Assistant to Professor Jamal Greene, Teaching Assistant to Professor Thomas Merrill, Human Rights Institute 1L Advocates Program.

YALE UNIVERSITY, New Haven, CT
B.A., in Ethics, Politics, and Economics, received May 2019
Honors: Class of 2019 Commencement Marshall
Activities: The Yale Politic Magazine; Fifth Humour Sketch Comedy group; Worked approximately 20 hours per week to finance education

EXPERIENCE

American Civil Liberties Union — New York, NY
Speech, Privacy, and Technology Team Internship — May 2023 – August 2023

Knight First Amendment Institute — New York, NY
Litigation Extern — August 2022 – December 2022
Research Assistant, Press Freedom Project — January 2022 – April 2022
Supported innovative litigation efforts about issues related to digital rights and the First Amendment, such as: the use of spyware by powerful officials, Texas and Florida laws targeting social media sites, and surveillance of journalists.

Electronic Privacy Information Center (EPIC) — Washington, DC
Internet Public Interest Opportunities Program Clerkship — May 2022 – August 2022
Performed tasks focused on privacy in the digital age. Drafted legal memoranda regarding Federal Trade Commission (FTC) complaints, wrote model amicus brief about Section 230 immunity, drafted Freedom of Information Act (FOIA) request regarding surveillance of individuals in prisons, supported legislative efforts regarding the American Data Privacy and Protection Act (ADDPA).

Deloitte Government & Public Service — Washington, DC
Consultant — October 2019 – August 2021
Supported a number of projects at the intersection of technology and the public interest. Completed internal projects with Deloitte's Trustworthy and Ethical Technology team and Deloitte's 5G team.

LANGUAGES: Arabic (heritage speaker); French (fluent)

Columbia Law School

Registration Services

law.columbia.edu/registration
435 West 116th Street, Box A-25
New York, NY 10027
T 212 854 2668
registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

06/08/2023 16:59:29

Program: Juris Doctor

Sarah Al-Shalash

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6407-1	Advanced Constitutional Law: 1st Amendment	Healy, Thomas Joseph	3.0	A
L6905-1	Antidiscrimination Law	Johnson, Olatunde C.A.	3.0	B+
L6472-1	S. Special Topics in Federal Courts	Schmidt, Thomas P.	2.0	A
L6683-1	Supervised Research Paper	Richman, Daniel	2.0	A
L6822-1	Teaching Fellows	Merrill, Thomas W.	4.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-2	Evidence	Capra, Daniel	4.0	A
L6299-1	Ex. The Knight First Amendment Institute	DeCell, Caroline; Diakun, Anna	2.0	A
L6299-2	Ex. The Knight First Amendment Institute - Fieldwork	DeCell, Caroline; Diakun, Anna	3.0	CR
L6425-1	Federal Courts	Metzger, Gillian	4.0	A-
L6675-1	Major Writing Credit	Richman, Daniel	0.0	CR
L6685-1	Serv-Unpaid Faculty Research Assistant	Emens, Elizabeth F.	2.0	A
L6683-1	Supervised Research Paper	Richman, Daniel	1.0	A

Total Registered Points: 16.0

Total Earned Points: 16.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-4	Criminal Law	Seo, Sarah A.	3.0	B+
L6679-1	Foundation Year Moot Court		0.0	CR
L6474-1	Law of the Political Process	Greene, Jamal	3.0	A-
L6121-11	Legal Practice Workshop II	Harwood, Christopher B	1.0	P
L6116-4	Property	Merrill, Thomas W.	4.0	A-
L6118-2	Torts	Rapaczynski, Andrzej	4.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-7	Legal Methods II: Contemporary Issues in Constitutional Law	Liu, Goodwin	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Genty, Philip M.	4.0	B+
L6133-1	Constitutional Law	Greene, Jamal	4.0	B+
L6105-4	Contracts	Emens, Elizabeth F.	4.0	A-
L6113-2	Legal Methods	Briffault, Richard	1.0	CR
L6115-11	Legal Practice Workshop I	Harwood, Christopher B; Hong, Eunice	2.0	P

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 61.0

Total Earned JD Program Points: 61.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	James Kent Scholar	2L
2021-22	Harlan Fiske Stone	1L

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Ms. Sarah Al-Shalash for a clerkship in your chambers. Ms. Al-Shalash is a very smart, engaging, and thoughtful law student, who I expect will be a terrific clerk.

I know Ms. Al-Shalash in two ways: as a student in my Contracts class in Fall 2021 and as my Research Assistant during the Summer through Fall of 2022. I therefore have a strong basis on which to comment on her performance and prospects.

My introduction to Ms. Al-Shalash came through first-year Contracts in the Fall of 2021. The grades in that course were based primarily on a difficult anonymously graded exam, which combined multiple-choice questions and essays. Students were required to write two essays: one analyzing traditional legal problems in order to predict how a court would decide them, and a second evaluating the conceptual underpinnings of contract law and applying them to specific doctrines. The exam also required students to apply their knowledge of doctrine to solve problems on a set of challenging multiple-choice questions. Ms. Al-Shalash did a fine job on all three portions of the exam, and she earned an "A-" in the course. She was also a thoughtful class participant, memorably so.

Based on her terrific performance in Contracts, I invited Ms. Al-Shalash to become my Research Assistant (RA) beginning in the Summer of 2022. My RAs submit written memos to me, and they also present their findings to each other and to me in periodic RA Briefing Meetings. Ms. Al-Shalash conducted interdisciplinary research on widely varying topics related generally to gender and disability discrimination. She wrote strong memos on these topics and presented her work effectively in the Briefing Meetings. She earned an "A" in this position.

Ms. Al-Shalash has had an impressive law-school career so far, both inside and outside the classroom. She earned Harlan Fiske Stone Honors for her academic performance during her 1L year, and, because of her demonstrated commitment to pursuing a career in civil/human rights law and technology, she is a Public Interest/Public Service Fellow at the Law School. She is currently Executive Articles Editor for the *Columbia Science and Technology Review*, overseeing a team of nearly forty Articles Editors and Staff Editors and serving as the key liaison between the journal and the authors. She has served as the Public Interest Event Planning Chair for the Columbia Legal Technology Association; a CLS Peer Mentor; a Clerkship Diversity Initiative Scholar; and a member of the 1L Human Rights Advocates Program. Many of these activities involve mentoring others, which is a lifelong passion of hers.

She has sought out research and teaching opportunities during her first two years at Columbia, externing with the Knight First Amendment Institute, which is an appellate litigation public interest organization focused on protecting civil liberties in the digital age, and serving as a Research Assistant to Professor Jamal Greene as well as to me. She has served as a Teaching Assistant for Property and as an Academic Coach for several students in the subject of Contract Law.

During her summers, Ms. Al-Shalash has been gaining experience that builds on her already strong skill set. She spent her 1L summer at the Electronic Privacy Information Center, where she worked on amicus briefs regarding Section 230 liability and supported advocacy efforts for federal privacy legislation. Currently, Ms. Al-Shalash is working at the ACLU Speech, Privacy and Technology Project.

Before law school, Ms. Al-Shalash worked for two years as a Consultant in Deloitte's Public Sector practice. In this role, she served a variety of public sector clients, including the Department of Defense and Nadia's Initiative (a non-profit begun by Nobel Peace Prize Winner Nadia Murad). This role required her to work in a fast-paced environment, to collaborate with across teams and with clients, to adjust to new settings quickly, and to be extremely attentive to detail. Ms. Al-Shalash's interest in the law long predates that job, however; at sixteen, she was listening to Supreme Court oral arguments in her spare time.

On a personal note, I might add two points. First, her commitment to public service work comes from her experience growing up in an Iraqi family, a Muslim girl in a conservative Texas town. Second, before law school, Ms. Al-Shalash was a comedic performer; this was her main extracurricular activity in high school and college. This taught her about taking risks and integrating others' responses into her performance, which has helped her become someone who takes feedback in stride.

In sum, Ms. Al-Shalash is a smart, talented, and engaging law student deeply committed to public service. I believe she will be a terrific clerk, and I strongly recommend her to you.

Let me know if I can provide any other information. I would be happy to speak further. I am out of the office this Summer, but recommendations are a priority, and I can generally be reached through my assistant, Kiana Taghavi (ktaghavi@law.columbia.edu), or on my cell phone at 718-578-9469.

Sincerely,

Elizabeth Emens - eemens@law.columbia.edu - 212-854-8879

Elizabeth F. Emens

Elizabeth Emens - eemens@law.columbia.edu - 212-854-8879

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in support of Sarah Al-Shalash's application to clerk in your chambers. Having gotten to know Sarah as her professor for two classes and in her capacity as my research assistant, I would cheerfully hire her myself if I were a judge. I hope to persuade you to hold her in similarly high esteem.

To put first things first, Sarah is an excellent law student. It shows in her grades, but they understate her legal ability. I first came to know Sarah in her first semester of law school, when she was a student in my 33-student Constitutional Law "small group." The "small group" experience allows a professor to become well acquainted with the class—everyone in the class was on call many times over the course of the semester, class participation was encouraged even for students who were not on call, and office hours were lively, often continuing topics raised in class with most of the class members present. I find a class of this size especially valuable for Constitutional Law, a course whose subject matter can expose students to vulnerabilities that are easier for them to experience—and for the professor to manage—in a more intimate setting. Sarah excelled in this environment. She was always well-prepared, was deeply curious, and was respectful of others. She was also remarkably self-possessed, exuding an intellectual maturity that one does not always encounter in first-year law students. I genuinely looked forward to her interventions, which I came over the course of the semester to recognize as the product of a preternaturally thoughtful mind.

The downside of a small group is that the class size typically produces an unusual number of excellent exams, which makes the grading curve especially unforgiving of strong performers who miss a random point here or there on the final. Sarah produced the 11th highest exam score, but this was good for just a B+: only the top 10 scores could receive A-level grades. Her exam was a strong one by any reasonable measure.

In her second semester of law school, Sarah enrolled in my 126-student Law of the Political Process class. Law of the Political Process is a theoretically rigorous election law class that immerses students in the constitutional and statutory doctrine around voting rights, rights of political association, districting and gerrymandering, and campaign finance. The course was extremely demanding. It required advanced competence in constitutional law, comfort with interpretation of several complex statutes, an ability to navigate confusing and self-contradictory case law with Byzantine factual records, and the agility to move back and forth between the highly conceptual and the highly specific. Students reported the workload as unusually heavy for a three-credit course. The course attracts highly motivated students, many of whom have already done related advanced coursework and a surprising number of whom have previous professional experiences in election-related settings. For these reasons, the course has in the past been limited to upperclass students —the year Sarah took the course was the first time 1L students were permitted to enroll. Despite being a 1L, Sarah was again a high performer, submitting a top-25 exam out of the 126 students in the course.

Impressed by her legal acumen, her maturity, and her demeanor, I asked Sarah if she might be interested in serving as a research assistant for me in the fall of 2022 to provide support for an ongoing book project. She agreed, and I gave her two of the more difficult assignments I have given any RA in recent years. The first project required her to research the empirical relationship between women's access to reproductive care in the 1960s and 1970s and their levels of civic participation; the second required her to scour the legislative record to see the how members of Congress defended the constitutionality of the Civil Rights Act of 1875 over the several years in which aspects of the law were being debated. For the latter project, Sarah was almost entirely self-directed, structured her own time and organization of the research, and produced a 92-page research memo that will supply material crucial to the book project. I had high expectations for what Sarah would produce as a research assistant, and she far exceeded them.

Purely in terms of the work of a judicial clerk—the legal analysis, the bench memos, the draft opinions and orders, the reliability and maturity—Sarah is a high-upside, low-risk candidate. But those are not the only reasons to give her your highest consideration. Sarah also would bring to chambers a diverse set of life experiences, acquired at significant personal cost to her. Sarah was born in Texas to two Iraqi immigrants. After a three-year move to Versailles, where her father pursued work as an engineer, Sarah's family returned to Texas, where she spent most of her childhood. What might have been an idyllic middle-class life in the Dallas suburbs for some was a whirlwind of Islamophobia, racism and xenophobia for a Muslim family that had spent three years living in France. Sarah overcame insults and hostility to become a star student and debater before heading to Yale for college. There she experienced another culture shock, this time based in class, and again had to overcome cultural alienation—leaving home, which women in her community rarely did before marriage, had strained her relationship with her family.

It would be understandable for someone to become withdrawn and embittered by these experiences, but Sarah has drawn strength from adversity. She embraces challenges—whether it's the Great Books course at Yale or Law of the Political Process at Columbia—she is a voracious consumer of legal writing, and she has genuine personal and professional commitments, in her case to decoupling the relationship between technology and power. She's also a delightful—and very funny—person (she was a comedic performer from age 14 to 22, and directed a sketch comedy group in college). As I said, if I were a judge, Sarah would be a top choice. She should be one for you too.

Jamal Greene - jamal.greene@law.columbia.edu - 212-854-5865

Thank you for your kind consideration. Please do not hesitate to reach out if I can be of additional assistance.

Sincerely,

Jamal Greene
Dwight Professor of Law

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Sarah Al-Shalash

Dear Judge Walker:

I write to enthusiastically support the application of Sarah Al-Shalash – a rising 3L at Columbia Law School, Class of 2024 -- to be your law clerk. She is whip smart, writes beautifully, and would doubtlessly do extraordinary work in your chambers. She's also a delightful and inspiring person.

I first met Sarah during her 1L year, when I was assigned to be her mentor as part of the Public Interest/Public Service Fellows Program. She had been selected for that program, in part, because of her undergraduate work at Yale, and the work she did before law school for Deloitte – as a public sector consultant working with, among other clients, Space Force(!) – and at the State Department. As she has explained to me:

When I began my undergrad career, I was interested in international relations.
Specifically, I was interested in the Middle East, and the role of the West in Middle Eastern conflict. I thought I would work for a non-profit or in an aid organization.

In pursuit of this goal, I applied for an internship at the State Department. I wanted to
work for an embassy in the Middle East. Unfortunately, I was waitlisted for the positions I was most interested in. Instead, I was offered a position at one of the bureaus in DC. This bureau was relatively new, and very modern. They were working on issues of technology in international relations. My internship was the summer of 2017, and the 2016 election loomed large then. Most of my work focused on disinformation and misinformation, and I fell in love with the issues at the edge of this new horizon.

Sarah has gone to work with organizations grappling with the hardest digital privacy issues – EPIC, the Knight Institute, and (this summer) the ACLU. And she used her 2L Note for the Science and Technology Law Review for just such an issue, under my supervision. She chose quite a challenging topic: does the Fourth Amendment restrict reverse keyword searches by the Government, and, if not, what other doctrinal resources might be available. The topic was challenging for several reasons. To begin, just finding judicial discussions of the issue was hard. Although there is good evidence that law enforcement agencies are using subpoenas (not warrants) to obtain this information, judicial analyses are sparse. Sarah rose to that challenge by looking to not just the limited cases precisely on point but to the growing number of cases involving geofence warrants – another reverse search, whose analysis offers some analogies. But the real challenge for Sarah, given her commitments to privacy protections, was facing up to the limits of the Fourth Amendment in the area, and recognizing that even current First Amendment doctrine would offer little help. Sarah rose to this challenge as well, never letting her ideological preferences get in the way of cold case law analysis and always aware of the limits of constitutional protection.

Sarah was an utter pleasure to work with. She can write quickly and powerfully, and is deft indeed at case law analysis. Moreover, it was a pleasure to work with her, as she responds to criticism speedily and effectively.

Sarah's grades are quite good, particularly after her first semester 1L year. I often find that students who have not gone directly from college don't immediately take to law school exams. But she now seems to be firing on all cylinders.

Only when I pushed Sarah for her personal backstory did I realize the extent of her personal accomplishment and strength of character. She grew up in Plano, Texas, the daughter of Iraqi immigrants (her dad escaped Iraq on foot to avoid conscription into the Iraqi army during the 1990 Gulf War). Her time in the Dallas area was often painful:

I watched my teachers and classmates cheer on the war in Iraq as my mother fielded phone calls from back home, telling her that her family members had been brutally murdered on the streets of Baghdad. Everyone around me seemed to accept that my culture and my religion was something to be feared and denounced. My entire childhood, I experienced strong Islamophobia and anti-Arab prejudice.

The experience led her to work hard, in hopes of going to college outside of Texas. But her acceptance to Yale led to only more difficulties, as her parents refused to let her leave home, and ended up cutting her off financially. Attending Yale without the money to buy required books was a life-changing experience:

For better or for worse, that experience taught me a lot. It taught me how to be gritty, and how to work hard even when it feels like the odds are stacked against you. I took a full course load, worked 2-3 student jobs per semester, and ran several student organizations. In the summer, I always took one "resume" job (an internship that would be relevant to my career), and 3-4 "real"

Dan Richman - drichm@law.columbia.edu - 212-854-9370

jobs (jobs that I knew would give me the reserves for another year of school). Eventually, this all became second nature to me, and the struggles I felt so acutely in my first few years of school began to feel manageable.

Against this backdrop, Sarah's law school performance and the professional path she has charted are indeed a triumph.

I think you'd like Sarah a lot and am confident she'd be a spectacular law clerk. Her commitment to public interest work, top-notch intellect, and proven record of sustained and excellent writing would enrich any Chamber. Both in print and in person, she expresses herself clearly and with tight analytical lines. She's also a lovely person – calm, mature, with a wonderful sense of humor (she ran a sketch comedy group at Yale) and real leadership skills (she was a Yale Commencement Marshal). You'll love working with her and watching her soar thereafter when she continues her public interest work. If there is anything else I can add, please give me a call.

Respectfully yours,

Daniel Richman

Dan Richman - drichm@law.columbia.edu - 212-854-9370

SARAH AL-SHALASH
Columbia Law School J.D. '24
214-417-2150
sarah.al-shalash@columbia.edu

CLERKSHIP APPLICATION WRITING SAMPLE

The writing sample below is an excerpt from my student Note: *Finding A Needle In A Haystack: Reverse Keyword Searches, Speech, And Privacy*. The Note discusses the advent of reverse keyword searches, a novel investigative method by which law enforcement can compel Google and other online search providers to divulge the information of any and all users who searched for a particular set of terms; if they believe these searches will reveal the perpetrator of or witnesses to a particular crime. The Note makes two claims: First, that existing Fourth Amendment doctrine does not protect against these forms of search, and that this lack of protection should be cause for concern. Second, that the First Amendment can and should provide a buttress against law enforcement uses of reverse keyword searches.

The excerpt below touches on the first point: that the Fourth Amendment is likely to be insufficiently protective of the civil liberties interests implicated by these investigative methods. Only one case thus far has litigated the constitutionality of reverse keyword searches. Therefore, in order to predict the constitutional analysis that will be applied to future challenges to reverse keyword searches, I rely heavily on another, similar form of search—the geofence search. A geofence search is a similar law enforcement investigative tool which allows police to compel companies like Google to turn over the information of individuals who were recorded as being in or near a particular place during the time at which a crime occurred.

This Note benefited from substantive feedback from my Note Advisor, Professor Daniel Richman.

PART II: APPLYING THE FOURTH AMENDMENT TO REVERSE SEARCH WARRANTS

a. Introduction

Very little litigation about reverse keyword searches has been undertaken.[1] This part of the Note attempts to fill this gap in the literature by assessing the current state of Fourth Amendment doctrine, particularly with respect to reverse searches, and using that information to determine how courts might apply that doctrine to reverse keyword search warrants. Because of the dearth of reverse keyword search cases, this analysis will rely heavily on the existing case law regarding geofence warrants, the reverse keyword search warrant's closest analog.

Like reverse keyword searches, geofence warrants allow law enforcement to commandeer the databases of big technology companies like Google. With one warrant, law enforcement can access millions of data points—and potential suspects. Like reverse keyword searches, geofence warrants are undertaken in order to identify a suspect, rather than with a suspect in mind. Like reverse keyword searches, the information obtained in geofence warrants is "voluntarily" given to Google when individuals use the technology company's services and implicitly or explicitly "agree" to collection of their information.[2]

---

[1] *People v. Seymour* is the only publicly available challenge to information obtained through a reverse keyword search warrant. Motion to Suppress Evidence from a Keyword Warrant & Request for a Veracity Hearing at ¶ 2, *People v. Seymour*, No. 21CR20001 (Colo. 2022) ("No court has considered the legality of a reverse keyword search").

[2] Whether this data-sharing can be accurately described as "voluntarily given" is heavily contested, and a question that this Note attempts to grapple with. See Part II.C.ii, *infra*. Many observers of the modern data-economy argue that even where individuals know their information is being collected and stored, and even where they affirmatively accept such practices, they are nonetheless not providing "meaningful consent." *See, e.g.,* Neil Richards, Woodrow Hartzog*, Privacy's Trust Gap: A Review Obfuscation: A User's Guide for Privacy and Protest by Finn Brunton and Helen Nissenbaum Cambridge and London: The Mit Press, 2015,* 126 YALE L.J. 1180 (2017) ("Thinking of privacy as an issue of personal choice, preferences, and responsibility has powerful appeal.[…] Yet there is a problem with this view of the digital world…[t]he digital consumer is not like the classic American myth of the cowboy, a rugged and resilient island of autonomy set against the backdrop of the digital frontier.[…] In the digital world, we may heap responsibility on individual users of technology, but they lack options for protecting themselves.").

This section will cover (i) how warrant requirements and third-party doctrine have been applied to geofence warrants, (ii) what key differences might nonetheless make the geofence analysis inapplicable to reverse keyword searches, (iii) how reverse keyword search warrants might be analyzed under existing Fourth Amendment doctrine, and (iv) how the good faith exception may apply in the context of reverse keyword search warrants. Ultimately, the analysis suggests that the Fourth Amendment is an insufficiently protective or certain guardrail on government intrusions of this nature.

b. Geofence Warrants and the Fourth Amendment

In total, geofence warrants have been challenged a total of eleven times in the lower federal courts, to mixed results—although on balance most applications have either been granted or upheld under the good faith exception.[3] On these eleven challenges, three decisions have denied the legality of the warrant, five have upheld the legality of these warrants, and three have upheld the use of the evidence from the warrant under the good faith exception.[4] This inconsistency in the lower courts is evidence of the deep uncertainty that current Fourth Amendment doctrine has

[3] The legality of geofence warrants is at issue in eleven publicly reported federal cases: *Matter of Search of Info. Stored at Premises Controlled by Google, as further described in Attachment A*, No. 20 M 297, 2020 WL 5491763 (N.D. Ill. 2020) (geofence warrant application denied); *Matter of Search of Info. Stored at Premises Controlled by Google*, 481 F. Supp. 3d 730 (N.D. Ill. 2020) (geofence warrant application denied); *Matter of Search Warrant Application for Geofence Location Data Stored at Google Concerning an Arson Investigation*, 497 F. Supp. 3d 345 (N.D. Ill. 2020) (geofence application granted); *Matter of Search of Info. that is Stored at Premises Controlled by Google, LLC*, 542 F. Supp. 3d 1153 (D. Kan. 2021) (geofence application denied); *Matter of Search of Info. that is Stored at Premises Controlled by Google LLC*, 579 F. Supp. 3d 62 (D.D.C. 2021) (geofence warrant application granted); *United States v. Chatrie*, 590 F. Supp. 3d 901 (E.D. Va. 2022) (finding the geofence warrant was improperly issued but upholding the use of evidence under the good faith exception); United States v. Davis, 2022 WL 3007744 (M.D. Ala. July 28, 2022) (upholding the legality of the geofence warrant); *United States v. Cruz, Jr.*, No. 22-cr-0064 (D.D.C. 2023) (evidence from geofence warrant upheld because it was properly issued, else the good faith exception applied); *U.S. v. Rhine*, No. CR 21-0687 (RC), 2023 WL 372044 (D.D.C. 2023) (denying motion to suppress evidence obtained by a geofence warrant); *United States v. Smith*, No. 3:21-CR-107-SA, 2023 WL 1930747 (N.D. Miss. 2023) (finding law enforcement failed to comply with the narrowing requirement of the warrant, but upholding evidence on basis of the good faith exception); *Matter of Search of Info. Stored at Premises Controlled by Google*, 2023 WL 2236493 (S.D. Tex. 2023) (upholding the legality of the geofence warrant).

[4] *Id*.

engendered, an uncertainty driven in no small part by the rapidly changing technological landscape.[5]

State courts are another important site of contestation for geofence warrants. Here too, the evidence (such that it exists) about the court's response is mixed. In the six cases that were publicly available, state courts upheld the use of geofence warrants in three of them.[6] In one of these cases, the court found that the geofence warrant had been improperly issued, but that it was subject to the good faith exception.[7] In the remaining three cases, state courts rejected the use of geofence warrants.[8] In one of those cases, the court found that the geofence warrant had been improperly issued, that the good faith exception applied, but that notwithstanding the good faith exception the warrant was required to be excluded under California statutory law.[9]

As this catalog of publicly-available geofence cases reveals, existing doctrine about the legality of these investigative tools is best described as uncertain. Nevertheless, geofence warrants are an important analog to the reverse keyword search warrant case.

---

[5] For more on the uncertainty regarding the scope of the Fourth Amendment engendered by recent decisions like *Carpenter v. US*, see: Matthew Tokson, *The Aftermath of Carpenter: An Empirical Study of Fourth Amendment Law*, 2018-2021, 135 Harv. L. Rev. 1790, 1800 n. 64 and 65 (2022).

[6] An EFF investigation suggests that a California lower court denied a suppression motion in the *People v. Meza*. Jennifer Lynch, *EFF Files Amicus Briefs in Two Important Geofence Search Warrant Cases*, EFF (Jan. 31, 2023) (https://tinyurl.com/2s3eb5kv); In re: Motion to Suppress Geofence Evidence, *Arizona v. Batain*, 2022 Az. Superior Court (Pima County, 2022) (upholding geofence on the basis of the good faith exception) (https://tinyurl.com/2p8er85a). Reporting indicates that a geofence was permitted by a Jefferson Circuit Judge in Louisville, Kentucky for in a murder investigation of the death of Tyree Smith. Jacob Ryan, *To Solve Murders, Louisville Police Turn to Techy 'Geofence' Warrants—But Net Few Arrests*, LEO WEEKLY (Oct. 22, 2021) (https://tinyurl.com/2s4bkkrw).

[7] In re: Motion to Suppress Geofence Evidence, *Arizona v. Batain*, 2022 Az. Superior Court (Pima County, 2022).

[8] *See In re Info. Stored at the Premises Controlled by Google*, 2022 Va. Cir. (Fairfax Co. Feb. 24, 2022) (finding that a proposed geofence warrant was impermissible under the federal constitution because it was lacked particularity and probable cause); Order Granting Motion to Suppress, *People v. Dawes*, No. 19002022 (CA Super. Ct. San Francisco 2022) (finding the geofence warrant prohibited, regardless of its constitutionality, because of CalEPCA, a California statute); Memorandum of Decision and Order on Defendant's Motion to Suppress Search Warrant, *Commonwealth v. Fleischmann*, 2021 Ma. Sup. (https://tinyurl.com/59zcxwa2).

[9] Order Granting Motion to Suppress, *People v. Dawes*, No. 19002022 (CA Super. Ct. San Francisco 2022).

i. Geofence Warrants and the Third-Party Doctrine

Courts, and Google, have largely treated geofence warrants as covered by the Fourth Amendment, suggesting that they believe that *Carpenter* applies to this form of search.[10] This development may suggest that reverse keyword searches will also fall under the Fourth Amendment's protections. But there is reason to remain concerned about the Fourth Amendment's scope in this area: Courts have generally "presumed, without deciding" that *Carpenter* covers geofence warrants.[11] This language suggests that the uncertainty of *Carpenter* has been weakly papered-over by the courts, rather than resolved decisively in favor of finding reverse searches to be Fourth Amendment searches.

ii. Geofence Warrants and the Probable Cause Requirement

In the context of geofence searches, the probable cause requirement has proven flimsy. In these cases, the courts have required that (1) there is a fair probability that a crime has been committed, and (2) a fair probability that the evidence of a crime will be in the particular place to be searched (typically Google's databases).[12] Generally, the first prong of the test is easily met:

---

[10] Google maintains that geofence searches require a warrant under the SCA and the Fourth Amendment, and lower federal courts have presumed without deciding that the Fourth Amendment applies to geofence warrants. *See* Brief of Amicus Curiae Google LLC in Support of Neither Party Concerning Defendant's Motion to Suppress Evidence from a "Geofence" General Warrant, *US v. Chatrie*, 590 F.Supp.3d 901 (E.D. Va. 2022) (Arguing that it is "[C]lear that a geofence request constitutes a 'search' within the meaning of the Fourth Amendment and that, absent an applicable exception, the Constitution independently requires the government to obtain a warrant to obtain LH information. Users have a reasonable expectation of privacy in their LH information, which the government can use to retrospectively reconstruct a person's movements in granular detail. Under Carpenter, the 'third-party doctrine' does not defeat that reasonable expectation of privacy merely because users choose to store and process the information on Google' servers."). *See also, e.g.,* 590 F. Supp. 3d at 925 ("Because the Court will independently deny Chatrie's motion to suppress by considering the validity of the Geofence Warrant, the Court 'need not wade into the murky waters of standing,' i.e., whether Chatrie has a reasonable expectation of privacy in the data sought by the warrant."); 579 F. Supp. 3d 62, 74 (D.D.C. 2021) ("Because the government applied for a search warrant, the Court assumes (but does not decide) that the Fourth Amendment's restrictions on searches and seizures apply to the collection of cell phone location history information via a geofence.").

[11] *See* quotes from *US v. Chatrie* and *Matter of Search of Info. that is Stored at Premises Controlled by Google LLC supra* at note 88.

[12] 579 F. Supp. 3d at 75 (D.D.C. 2021).

law enforcement asks for a geofence warrant when it is investigating a crime for which it has no leads.[13] One might expect the second requirement to present more of a barrier, but it often does not. Courts often assume that evidence will be available on the targeted database.[14] They assume that most people carry cellphones with them, and that those cellphones (and the apps they contain) are tracking the location information of the person in question.[15]

This version of the probable cause requirement offers no meaningful constraints on government authority. In this context, it becomes a mere formality: it is fair to assume that nearly everyone has a cellphone, and it is also fair to assume that nearly everyone with a cellphone is having their location tracked by Google, Yahoo, Microsoft, Snapchat, and any number of other companies.[16]

iii. Geofence Warrants and the Particularity Requirement

---

[13] *See, e.g., id.* at 77. This may undermine some of the concerns evinced by reproductive rights activists in the wake of *Dobbs v. Jackson Women's Health Organization*, because it suggests that conducting a search to gather evidence of criminal activity (there, abortion) without evidence that a crime has occurred will likely face heightened challenges as to the probable cause requirement.

[14] *See, e.g.,* 497 F.Supp.3d at 356 ("Unlike virtually any other item, it is rare to search an individual in the modern age during the commission of a crime and not find a cell phone on the person. Thus, it is reasonable to infer that suspects coordinating multiple arsons across the city in the middle of the night, as well as any passersby witnesses, would have cell phones.").

[15] *See* 579 F.Supp.3d at 78. *In the Matter of Search of Info. that is Stored at Premises Controlled by Google LLC* (hereinafter "D.D.C case"), the court upheld the use of a geofence warrant to identify suspects alleged to have committed federal crimes in a remote, industrial location. Using the governing standard, the court determined that the requirement for probable cause had been met. The perpetrators were seen on CCTV using cellphones, and given the vastness of Google's location data troves, there was a fair probability that their information was available through a search of the company's data.

But as the court in the D.D.C. case notes, a showing that the suspect had a cellphone at the crime scene is not a requirement for finding probable cause. The court in the case says: "The core inquiry here is probability, not certainty, and it is eminently reasonable to assume that criminals, like the rest of society, possess and use cell phones to go about their daily business." The court notes that in another case, *Matter of Search Warrant Application for Geofence Location Data Stored at Google Concerning an Arson Investigation*, the district court granted a geofence warrant without evidence that the suspects possessed cellphones.

[16] 579 F.Supp.3d at 78 (noting that it would be the "relatively rare" case when a cell phone does not transmit location information to Google, noting that three-quarters of the world's phones contain Google's operating systems.).

Courts have used several factors to determine whether a geofence warrant meets the "particularity" required to issue a warrant. Typically, these factors include: geographic scope, density of the searched area, time span covered by the search, and time of search itself.[17] Ultimately, the particularity inquiry turns on how many people are reasonably likely to be caught up in a search.

Where the aforementioned factors suggest that a geofence search is likely to catch the activity of a large number of people, courts have often rejected the warrant for lack of particularity. For example, in *United States v. Chatrie*, the government had sought and obtained data from a geofence spanning over three football fields and encompassing both a bank and a church.[18] In deeming the warrant unconstitutional, the court highlighted its concern with the warrant's lack of particularity.[19] The court admonished that it was "difficult to overstate the breadth of the warrant."[20] In other cases where courts have upheld geofence warrants, they have noted the warrant's limited geographic and temporal scope, and the fact that the area covered by the warrant is unlikely to be densely populated.[21]

c. Geofence Warrant Analysis Might Not Apply Neatly to Reverse Keyword Search Warrants

Though geofence searches are, in many ways, the clearest analog to reverse keyword search warrants, the two forms of search are distinct in material ways. As to the third-party doctrine,

---

[17] *See, e.g.,* 579 F.Supp.3d at 81-2 (analyzing the temporal and geographic scope of the geofence warrant to determine whether it was appropriate); 590 F. Supp. 3d at 918 (analyzing the temporal and geographic scope of the geofence warrant to determine whether it was appropriate).

[18] 590 F. Supp. 3d at 918.

[19] *Id*. at 930.

[20] *Id.*

[21] *See, e.g.,* 579 F.Supp.3d at 81-2 (finding that three hours of location data from a six-month time span was reasonable and particular within the meaning of the Fourth Amendment, and that a geofence covering only an undisclosed location and its parking lot was sufficiently narrow to meet the particularity requirement).

reverse keyword search warrants raise fewer concerns about location information and arguably entail more affirmative consent than geofence warrants, two factors that may make the third-party doctrine more likely to apply. As to the particularity requirement, it is more difficult to assess the scope of the warrant *ex ante* in the reverse keyword search warrant context than the geofence context. Finally, as to the probable cause requirement, it may be more difficult to assume that the information being sought is in the databases of a particular search engine provide in the reverse search context.

i. Location Information Not Implicated in the Same Way by Reverse Keyword Search Warrants

Even if the Fourth Amendment does constrain geofence searches, there is reason to think that *Carpenter*, and thus the Fourth Amendment, may nonetheless be inapplicable to reverse keyword search warrants. First, because geofence warrants implicate location-information, which the court has treated as meriting special concern in the Fourth Amendment context.[22] In *Carpenter* itself, the court noted the particular protections it had extended to surveillance implicating location information.[23]

Geofences are unlike reverse keyword searches in that they reveal an individual's precise location at a certain time. At worst, reverse keyword searches may reveal where an individual *intended* to go,[24] but they do not typically reveal their precise location and movements. This distinction may be material: revealing one's *intent* to go somewhere may not trench as closely on

[22] *Carpenter v. United States*,138 S. Ct. 2206, 2215 (2018) ("The Court has in fact already shown special solicitude for location information in the third-party context").
[23] *Id.*
[24] For example, in the Colorado case, *People v. Seymour*, the reverse keyword search warrant revealed the addresses that those caught in the warrant had searched for. The prosecution contended this was evidence that the defendants *did* go to this location. *People v. Seymour*, No. 21CR20001 (2022) (https://tinyurl.com/y46t9wsb).

protected privacy interests as revealing where someone actually *was*. Furthermore, many reverse keyword search warrants do not even reveal this much; in fact, several do not implicate location at all.[25] Rather, those warrants only reveal a person's interest in a particular topic or a particular individual.

ii. Reverse Keyword Search Warrants May Entail More Affirmative Consent than Location History

Reverse keyword searches are arguably distinct from both CSLI and geofence location information in that (1) online users more affirmatively "opt-in" to collection when they *enter* that information into a particular online search with an awareness that (2) that information is being closely monitored by Google.

First, online search can be characterized as materially distinct from the location tracking at issue in *Carpenter* and in geofence searches. Unlike location tracking, which is often enabled without any affirmative action by the user,[26] online search requires a user to actively go to a website (normally Google.com), and type in their query. And this affirmative action is often taken with complete knowledge of the fact that users' search activities are being closely monitored by the company.[27] *Carpenter* establishes that sometimes, revealing information to a third party does not undermine a user's reasonable expectation of privacy in that information, particularly when

[25] See Section I.a.ii, *supra*, discussing the Edina case, which only requested the information of those who had looked for a victim's name.

[26] Google officially claims that it only tracks the location of users who affirmatively opt-in to tracking. *Manage Your Location History*, Google (https://tinyurl.com/4jvrt6r9). Nevertheless, recent lawsuits and investigations have suggested that this location information is still being tracked and stored, even when users believe they have opted out. Taylor Hatmaker, *Google Gets Hit With a New Lawsuit Over 'Deceptive' Location Tracking*, TECH CRUNCH, Jan. 24, 2022 (https://tinyurl.com/6j7zr9md). Cecilia Kiang, *Google Agrees to $392 Million Privacy Settlement With 40 States*, N.Y. Times, Nov. 14, 2022 (https://tinyurl.com/6j7zr9md).

[27] Emilee Rader, *Awareness of Behavioral Tracking and Information Privacy Concern in Facebook and Google*, 14 SOUPS 51, 58-60 (study suggests that many internet users expect that Google is collecting what they are typing into the search bar, regardless of whether they actually submit the information).

information collection is subtle and the user has limited alternative options.[28] But in the case of online search, research suggests that the information collection in question is widely known, and there are alternative options (but query whether these alternatives are legitimate).[29] These distinctions suggest that at the very least, reverse keyword searches may be less likely to fall within the *Carpenter* doctrine than geofence warrants, their closest analog.

Second, geofence searches arguably come closer to the automatic CLSI collection in *Carpenter* than reverse keyword searches.[30] Traditional third-party doctrine assumes that an individual gives up their right to privacy by consensually revealing information to the third-party.[31] *Carpenter* found that the CSLI, though in a sense "voluntarily" handed over to cellphone companies, nevertheless could not truly be considered consensual because individuals had little meaningful choice in revealing that information.[32]

Like the CSLI in *Carpenter*, location information is often collected by companies like Google without much meaningful consent from users.[33] Like the CSLI in *Carpenter*, companies like Google track location information by default on users' phones. And echoing the argument

---

[28] *See supra* note 73.

[29] Companies like DuckDuckGo actively market their search engines as more private, less-invasive alternatives to Google search. *Privacy*, DUCKDUCKGO, https://tinyurl.com/2p87fsxn. For more alternatives, see: *Matt Burgess, Four Privacy-First Google Search Alternatives You Need to Try*, WIRED (Aug. 30, 2021), https://tinyurl.com/mwkt88vh. Arguably, this suggests that users of Google Search have "assumed the risk" of having their search queries collected and disseminated to law enforcement under the logic of *Miller* and *Smith*.

[30] Google has argued that location information is, in fact, *more* invasive than CSLI. Brief of Amicus Curiae Google LLC in Support of Neither Party Concerning Defendant's Motion to Suppress Evidence from a "Geofence" General Warrant, *US v. Chatrie*, 590 F.Supp.3d 901 (E.D. Va. 2022) ("Moreover, LH information can often reveal a user's location and movements with a much higher degree of precision than CSLI and other types of data. And rather than targeting the electronic communications of only a specific user or users of interest, the steps Google must take to respond to a geofence request entail the government's broad and intrusive search across Google users' LH information to determine which users' devices may have been present in the area of interest within the requested timeframe.")

[31] *See supra* note 66, and accompanying text.

[32] 138 S. Ct. at 2220 (Arguing that CSLI is unlike traditional forms of third-party data because individuals are constantly compelled to use cellphones, and by the very fact of using those cellphones, sending location information to cell towers. The Court argues that without an "affirmative" act, there cannot be "meaningful" voluntary consent).

[33] *See supra* note 104.

made and accepted in *Carpenter*, individuals can hardly "opt-out" of having a cellphone in the modern world.[34] While users can opt out of location collection, Google makes it incredibly difficult for them to do so, and sometimes even covertly continues collection.[35] Thus, unlike the CSLI in *Carpenter*, the collection of location information is not a condition of owning a cellphone, but given the difficulty of intervening in such collection, it is arguably similarly non-consensual.

iii. More Difficult to Understand the Scope of Reverse Keyword Search Warrants *Ex Ante*

Geofences that extend over a large or densely-populated area, or that span a long period of time, are sometimes subject to scrutiny related to the particularity requirement.[36] It's difficult to see how similar limiting standards will be imposed on reverse keyword search warrants *a priori*. Under the particularity requirement, courts make a determination about the reasonableness of the scope of a search before the warrant is issued. Thus, in the case of reverse keyword searches, courts are obliged to guess, at the outset, how many individuals' information will be captured in the reverse search. This is true in the case of geofence warrants as well, but the criteria that the courts look to to make that determination (geographic scope, length of time, density of the requested search area), are the sort of variables that are ordinarily within a judge's competence to estimate and compare. The same cannot be said of the scope of online searches. Most people—and judges in particular—are unlikely to have a sufficiently expert understanding of online search and search

[34] *See supra*, note 73.

[35] See *supra*, note 104. For more on the barriers Google imposes on users who attempt to prevent the company from tracking their location, see: Emily Dreyfuss, *Google Tracks You Even If Location History's Off. Here's How to Stop It*, WIRED (Aug. 13, 2018), https://tinyurl.com/325tt4kp; *Google Found To Track The Location Of Users Who Have Opted Out*, NBC NEWS (Aug. 13, 2018), https://tinyurl.com/ktkchb8y.

[36] *See, e.g.,* 590 F. Supp. 3d at 930; 2020 WL 5491763 at *5 ("As noted *supra*, the geographic scope of this request in a congested urban area encompassing individuals' residences, businesses, and healthcare providers is not 'narrowly tailored' when the vast majority of cellular telephones likely to be identified in this geofence will have nothing whatsoever to do with the offenses under investigation.").

results to estimate just how "reasonable" a particular reverse keyword search warrant might be.[37] At the very least, these kinds of estimates would be far more susceptible to error than the more traditional estimates of time, area, and density involved in geofence searches.

One potential rejoinder to this point is that these issues can be resolved through Google's multi-step process. By this argument, the inability of courts to determine *ex ante*, how many users will be swept into the reverse keyword search does not present a Fourth Amendment problem, because a court can make this determination before de-anonymization. This argument presents several problems. First, as a practical matter, it's not clear that Google and other major tech companies provide truly anonymized information at Step 1.[38] Relatedly, for the reasons listed above, it's not clear that courts have the technological competency to determine whether information has truly been "anonymized" at Step 1.[39] It may be particularly difficult for a court to determine how the information from a reverse keyword search may be combined with other information at law enforcement's disposal to reveal information intended to be outside of the scope of the first stage.[40]

---

[37] Indeed, the courts have often been accused of being significantly "behind the times" when it comes to understanding modern technologies. In 2010, for example, Chief Justice Roberts asked what the difference between a pager and email was. For more on this topic, see: Mary Graw Leary, *The Supreme Digital Divide*, 48 Tex. Tech L. Rev. 65, 71 (2015).

[38] In the *People v. Seymour*, for example, Google provided full IP addresses for each "anonymized" user at Step 1. *See* Motion Hearing Transcript at 105, *People v. Seymour*, No. 21CR20001 (2022) (https://tinyurl.com/y46t9wsb). An IP address can tell you the city, zip code or area code of your ISP, the name of your ISP, and a "best guess" of the latitude and longitude associated with that IP address. *See What You Get With This Tool*, What is My IP Address, http://whatismyipaddress.com. For example, my IP Address reveals my country, state, city, and the ISP associated with my computer (Columbia University). It also reveals the latitudinal and longitudinal coordinates associated with my IP address, which pinpoint a location eight minutes away from my home. Google's policy prohibits them from sharing complete IP addresses at Step 1, although they did so in this case. *See* Motion to Suppress Evidence from a Keyword Warrant & Request for a Veracity Hearing at ¶28, *People v. Seymour*, No. 21CR20001 (2022) (https://tinyurl.com/y46t9wsb).

[39] In fact, the extent to which any anonymization is truly possible, given our expanding data economy, is the subject of debate. *See*, *e.g.,* Gina Kolata, *Your Data Were 'Anonymized'? These Scientists Can Still Identify You*, N.Y. Times (July 23, 2019).

[40] Law enforcement agencies increasingly purchase access to services that aggregate information from data brokers. *See* Bennet Cyphers, *Inside Fog Data Science, the Secretive Company Selling Mass Surveillance to Local Police*,

iv. *Assumptions about Probable Cause are More Difficult to Make with Respect to Search History*

Courts assume (likely rightly) that individuals nearly always have a smart phone on them, and that smartphones are nearly always tracking the location of their owners.[41]

At first, it may seem that Google searches are equally ubiquitous. After all, Google fields 8.5 billion searches per day (99,000 per second).[42] However, it's not clear that individuals engaged in criminal activity are likely to conduct a Google search related to that activity. This potentially lower probability must in turn be discounted by the likelihood that the particular set of terms that an investigator queries in a reverse keyword search warrant are likely to be the ones that an individual engaged in criminal activity would have used. For these reasons, it seems nearly certain that the likelihood of conducting a successful geofence search is higher than the likelihood of conducting a successful reverse keyword search warrant. This in turn suggests that it is less "probable" that the requested evidence (incriminating search history) is in the location to be searched (Google's databases).

d. How might courts Analyze Reverse Keyword Searches

i. Third Party Doctrine and Reverse Keyword Searches

EFF (Aug., 21, 2022); Sharon Bradford Franklin, Greg Nojeim, Dhanaraj Thakur, *Legal Loopholes and Data for Dollars: How Law Enforcement and Intelligence Agencies Are Buying Your Data from Brokers, Center for Democracy and Technology* (Dec. 9, 2021). Frequently, they maintain that use of such services does not implicate any Fourth Amendment issues. Cyphers, *Inside Fog Data Science* ("Troublingly, those records show that Fog and some law enforcement did not believe Fog's surveillance implicated people's Fourth Amendment rights and required authorities to get a warrant."). Access to such resources can augment arguably "anonymized" searches, such as Step 1 of reverse keyword searches or geofence searches.

[41] *Mobile Fact Sheet*, Pew Research Center (April 7, 2021), https://tinyurl.com/yadh2yt4 (finding that 85% of Americans own smartphones).

[42] Maryam Mohsin, *10 Google Search Statistics*, Oberlo: Blog (Jan. 2, 2022), https://tinyurl.com/mwta2acc.

People v. Seymour is currently the only case addressing the use of reverse keyword search warrants. There, law enforcement used a reverse keyword search warrant to identify suspects in an arson investigation.[43] The reverse keyword search identified all users who had searched for the victims' address around the time of the arson.[44]

The Colorado District Court in *Seymour* found that the reverse keyword search at issue required the use of a warrant.[45] In justifying its decision, the court relied on federal law and in the alternative, state constitutional law.[46] Further, the court argued that the *type* of information at issue here was distinct from traditional information shared through the third-party doctrine because of the inescapability of the internet.[47]

Google has largely assumed that other reverse searches (geofence searches), require a warrant, and thus are not covered by the third-party doctrine.[48] In the geofence context, courts have consistently refused to investigate whether *Carpenter* applies—many instead "assume without deciding" that a warrant is required.[49] Google has extended its warrant requirement to the reverse keyword search warrant, and we might expect courts to do the same. If they do, then reverse keyword searches will presumptively require a warrant.

---

[43] Motion Ruling Transcript at 22-23, *People v. Seymour*, No. 21CR20001 (2022) (https://tinyurl.com/34ap8s94); District Court's Response to the Order to Show Cause at 22-24, *People v. Seymour*, No. 21CR20001 (2022) (https://tinyurl.com/bdfw2bsy).

[44] *Id.*

[45] *Id.*

[46] District Court's Response to the Order to Show Cause at 22-24, *People v. Seymour*, No. 21CR20001 (2022) (https://tinyurl.com/bdfw2bsy).

[47] District Court's Response to the Order to Show Cause at 22-23, *People v. Seymour*, No. 21CR20001 (2022) (https://tinyurl.com/bdfw2bsy) ("[T]he U.S. Supreme Court has been hesitant apply the third-party doctrine to digital records… Moreover, this Court has demonstrated a willingness to interpret the state constitution to afford broader protections than its federal counterpart. This is especially true as to the third party doctrine. Splitting with *Miller* and *Smith* respectively, this Court has held that Coloradans maintain a reasonable expectation of privacy under the Colorado Constitution in their financial records, and their telephone records, even though both reside with third parties." (citations omitted)).

[48] *See* Section II.B.i, *supra*, discussing courts' assumptions about whether geofence searches require a warrant.

[49] See *supra*, note 88.

Quite another question is whether reverse keyword search warrants *should* require a warrant. On one hand, reverse keyword searches involve the use of data collected by an internet service most people use almost daily. Even if these individuals are aware the information is being shared with Google, it is doubtful that they expect this information will be subject to invasive search by law enforcement.

However, reverse searches are "wide" rather than "deep" searches, a factor that seems to cut against the applicability of *Carpenter*.[50] They typically do not directly involve location information, which again cuts against the applicability of *Carpenter*. They also involve information that is arguably more consensually given than the CSLI in *Carpenter*, which was collected automatically from anyone who carried a phone. Search history may also be more consensually given than location history, which is collected nearly ubiquitously and very difficult to delete.

Carpenter's frustrating ambiguity sheds little light on the salience of these differences. Reading *Carpenter* narrowly, the differences between search history and location information seem to cut in favor of applying the third-party doctrine to reverse keyword searches. Without further elaboration from the Supreme Court, it's difficult to tell how far the analysis in *Carpenter* should extend.

ii. Probable Cause and Reverse Keyword Searches

As noted in Part II.C.iv, there are differences in the probable cause analysis involved in a geofence search and those involved in a reverse keyword search. Nevertheless, that distinction

[50] 590 F.Supp.3d at 926 (Discussing the validity of geofence warrants: "As this Court sees it, analysis of geofences does not fit neatly within the Supreme Court's existing 'reasonable expectation of privacy' doctrine as it relates to technology. That run of cases primarily deals with deep, but perhaps not wide, intrusions into privacy.").

may turn out to be immaterial. In determining whether a particular piece of information is likely to fall within the parameters of the probable cause requirement, courts have used a "fair probability" standard.[51] Even if the likelihood that an individual involved in criminal activity conducted an online search is lower than the likelihood that an individual involved in criminal activity's location was captured, there is still a "fair" likelihood that the former occurred. After all, the average person uses Google three to four times per day.[52] Most modern queries pass through an online search engine, and 92% of all global searches happen on Google.[53]

Perhaps this kind of bare showing that "most people Google things" will prove insufficient for a finding of probable cause.[54] However, it's not clear that a substantially stronger standard will replace it. In *People v. Seymour*, the Colorado courts found that the government made a sufficient showing of probable cause by arguing that the arson in the case was targeted, rather than random.[55] The government made this showing by arguing that the house was "non-descript," and that arson was a crime of a violent nature.[56] As a result, the state argued, it was likely that the individuals involved in the crime had searched for the address of the targeted home online.[57] At bottom, the standard the state appears to be relying on in *Seymour* is simply that if a crime appears to be pre-

---

[51] 579 F.Supp.3d at 74 (Holding that probable cause and fair probability are synonymous, and further that: "[a]t bottom, probable cause 'is not a high bar.'").

[52] Hazel Emnace, *23 Essential Google Search Statistics*, FIT SMALL BUSINESS (Oct. 25, 2022), https://tinyurl.com/veds8pfr.

[53] *Id.*; A Pew Research Center study found that 46% of surveyed individuals turned to online tools to conduct their research, compared to 25% who said they consulted with others, 8% of individuals who relied on print media, and 11% who relied on prior education. Eric Turner and Lee Rainie, *Most Americans Rely on Their Own Research to Make Big Decisions, And That Often Means Online Searches*, Pew Research Center (Mar. 5, 2020), https://tinyurl.com/nr6bb6am.

[54] Though there is reason to doubt that this will be the case. In the geofencing context, some courts have attempted to circumscribe the probable cause requirement by requiring that the government have evidence that a cellphone was used in the course of the crime. But over time, most courts have dropped this requirement.

[55] District Court's Response to the Order to Show Cause at 29, *People v. Seymour*, No. 21CR20001 (2022) (https://tinyurl.com/bdfw2bsy).

[56] *Id.*

[57] *Id.*

mediated, rather than random, there will be probable cause. This remains a far cry from the constraints of the traditional probable cause inquiry.

iii. Particularity and Reverse Keyword Search Warrants

As noted above, the particularity standard used in geofence search cases seems difficult to import into the geofence context. Geofence cases rely on variables like the size of the area in question, its population density, the time of day and span of time at issue in the search to determine whether a geofence warrant is sufficiently particular. Courts may use a similar strategy for reverse keyword search warrants, for example by evaluating how many terms are used in a particular search, whether the terms themselves are rare or common words, whether the search requires that certain phrases be included or excluded.

Nevertheless, the above-expressed concern remains: It would be difficult for the average person, let alone the average judge, to determine how many hits a search was likely to generate *ex ante*. The lack of judicial competence in this area could lead to two problems: First, that judges apply their own intuitions about the scope of a search *too* liberally, and thus yield varied results across warrant applications, making it difficult to anticipate whether particular activity will be protected. Second, and perhaps more plausibly, judges may understand their limited expertise in this area and apply criteria from previous cases *too* rigidly. Take this stylized example: if another court found twenty terms in a search was sufficiently particular, then the court in question may find that twenty-one terms is *per se* sufficient. This may not lead to the same issues of uncertainty, but it may make the warrant process open to manipulation or inflexible to the point of unfairness.

Particularity, in the context of reverse keyword searches, is the Fourth Amendment requirement with the fewest analogs in existing case law, and thus its application in the reverse keyword search context is difficult to predict. Nonetheless, what *is* foreseeable is that the existing

way in which courts evaluate particularity in the reverse search context cannot be readily imported into this context. Attempts to do so will likely be problematic and insufficiently protective.

e. The Good Faith Exception

Reverse searches have appeared in a moment in Fourth Amendment legal history in which the parameters of constitutional search are in flux.[58] This, of course, is no accident: *Carpenter* is itself the manifestation of a Fourth Amendment scrambling to keep pace with the explosion of digital surveillance tools available to law enforcement in the modern age.[59]

As the preceding pages have demonstrated, Fourth Amendment law is confusing and uncertain, and particularly confusing and uncertain to those subject to reverse search warrants. For criminal defendants against whom reverse keyword searches are used, this uncertainty may even work against them because of the existence of the good faith exception.

The good faith exception holds that where police conduct a search in reliance on a "reasonable and good faith belief that their conduct is lawful," the evidence they collect from said search will not be excluded in later legal proceedings.[60] A line of cases beginning with *United States v. Leon* suggest that if evidence is obtained in a manner that violates the Fourth Amendment, but an officer has not behaved in a "deliberate," "reckless" or "grossly negligent" manner, the evidence will not be excluded.[61] It does not seem likely that a court would characterize a search based on a doctrine rife with uncertainty as "deliberate" or "reckless." Thus, the doctrine's lack of clarity is itself a

---

[58] For further evidence of this constitutional uncertainty, see Tokson, *supra* note 76.

[59] *See* Susan Freiwald & Stephen W. Smith, *The Carpenter Chronicle: A Near-Perfect Surveillance*, 132 HARV. L. REV. 205, 205-6 (2018).

[60] *United States v. Leon*, 468 U.S. 897, 909 (1984) ("Nevertheless, the balancing approach that has evolved in various contexts—including criminal trials—'forcefully suggest[s] that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment'").

[61] *Davis v. United States*, 564 U.S. 229, 238 (2011).

shield for officers who conduct novel and under-litigated forms of search, such as the one at issue in this Note.

Furthermore, the highly factual nature of the particularity requirement in these cases (e.g., was the size of the data retrieved too large? Were the search terms sufficiently narrow?) is unlikely to set clear enough precedents for officers to be expected to learn from the invalidation of a reverse keyword search warrant. Therefore, it is unlikely that successive invalidations will have much of an effect on the applicability of the good faith exception in this context.

And while Google (and the courts whose decisions are available to the public) have largely assumed that reverse searches are Fourth Amendment searches requiring a warrant, the preceding analysis demonstrates that that is far from clear. Where a reverse keyword search is conducted without a warrant, law enforcement may rely on the good faith exception to admit evidence that is deemed unconstitutionally obtained. A recent study of courts applying *Carpenter* found that in in nearly 40% of cases where the constitutional validity of a search was at issue, the court never answered the question of whether *Carpenter* applied. [62]

Courts have been slow to take up reverse searches, and where they have taken up such searches, they have consistently failed to explore whether *Carpenter* applies.[63] This approach sustains the murkiness of the doctrine, which in turn makes it easier for challenged law enforcement officers to rely on the good faith doctrine as a defense.

f. Conclusion: The Fourth Amendment Is Insufficiently Protective

---

[62] Tokson, *supra* note 76 at 1809.
[63] Courts have largely assumed without deciding that *Carpenter* applies. *See supra* note 88.

The Fourth Amendment has been decried by myriad scholars and judges as insufficiently protective of privacy interests in the modern world.[64] In the case of reverse keyword search warrants, there is reason to suspect that the Fourth Amendment's protections (such that they are) will not extend to this new search practice. There is also reason to expect that where the Fourth Amendment does apply, its central guardrails—probable cause and particularity—may not be adequately protective of privacy interests. And finally, under the good faith exception, a court finding that a reverse keyword search has been improperly conducted or a warrant for such a search has been improperly issued is unlikely to offer any substantive recourse to present criminal defendants or future ones. The reverse keyword search warrant is a case study in just how ineffectual the Fourth Amendment, without more, can be—and, in particular, what an inadequate safeguard it can be in the face of rapidly advancing technology.

[64] *See* Freiwald and Smith, *supra* note 135 at 205-6 ("On May 24, 1844, a crowd gathered inside the United States Supreme Court chambers in the basement of the Capitol, eagerly awaiting a demonstration of an amazing new communication technology. They watched as inventor Samuel F.B. Morse successfully sent the first long-distance telegraph message—"What hath God wrought?"—to a railroad station near Baltimore.[…] That day may well have marked the last time the Supreme Court was completely in step with modern communication technology").; *See also* Neil Richards, *The Third-Party Doctrine and the Future of the Cloud,* 94 WASH. U.L. REV. 1441, 1447-1465 (2017) (discussing the Fourth Amendment's "lag problem").

Applicant Details

First Name	**Mohammed**
Middle Initial	**A**
Last Name	**Al-Shawaf**
Citizenship Status	**U. S. Citizen**
Email Address	**ma2112@georgetown.edu**
Address	**Address** Street **6630 Blair Rd NW** City **Washington** State/Territory **District of Columbia** Zip **20012** Country **United States**
Contact Phone Number	**8314022229**

Applicant Education

BA/BS From	**University of California-Berkeley**
Date of BA/BS	**May 2009**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 10, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Phillips, Anjali
Anjali.W.Phillips@who.eop.gov
Super, David
das62@georgetown.edu
202 525 9132
Garland, Rachel
RGarland@clsphila.org
Chertoff, Meryl
mjc87@georgetown.edu
9083707082

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Mohammed Al-Shawaf
6630 Blair Road NW
Washington, D.C. 20012

June 11, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a rising third-year student at Georgetown University Law Center and am writing to apply for a 2024 term clerkship. I am interested in clerking in your chambers because of your stellar reputation within the White House Counsel's Office, where I was a law clerk last semester. Additionally, I have personal and professional ties to the DMV area and plan to stay in the region after I graduate, another reason why I am interested in clerking on the Eastern District of Virginia.

I am a nontraditional applicant pursuing a district clerkship because I have always been motivated to serve my community. As the son of Iraqi-Americans whose lives were upended by war, I remember my parents having to work multiple jobs and struggling to make ends meet when I was growing up. That experience stuck with me and inspired me to work with people, especially from vulnerable communities, to build capacity and connections to economic opportunity. Prior to law school, I worked for ten years in small and large companies managing social and economic impact programs and partnerships. Although I am proud of the initiatives I led—from increasing access to finance for small and disadvantaged businesses to creating training and job pathways for diverse communities—I believed I could make a greater impact by working directly in the public interest.

Since entering law school, I have prioritized practicing law in different public interest settings, both as an advocate and at various levels of government, including as a full-time law clerk at the White House Counsel's Office. I am fascinated by how our system of government works and how it can be more just, fair, and equitable. I am interested in clerking because I want to gain a first-hand perspective on judicial deliberation and the way judges effectuate justice, both among the parties and in their community. I believe that the diversity of my experience before and during law school and my commitment to public service would make me a unique and valuable addition to your chambers.

I have attached my resume, transcripts, and writing sample. Letters of recommendation from Professor David Super (das62@georgetown.edu), Professor Meryl Chertoff (mjc87@georgetown.edu), my legal supervisor at the White House Counsel's Office, Anjali Phillips (Anjali.W.Phillips@who.eop.gov), and my legal supervisor at Community Legal Services, Rachel Garland (rgarland@clsphila.org), will be sent under separate cover from Georgetown's Clerkship Office.

Thank you and I look forward to the opportunity to interview with you and your chambers staff.

Respectfully,

Mohammed Al-Shawaf

Mohammed Al-Shawaf

6630 Blair Rd NW, Washington, D.C. 20012 | ma2112@georgetown.edu | 831-402-2229

EDUCATION

Georgetown Law School, Washington, D.C. (2021—2024)
J.D. Candidate, 3.65 cumulative GPA (3.85 2L year)
Honors: Top 10% (2L year, prior year cutoff); Anne Fleming Legal Services Fellow; Renne Public Law Fellow
University of California, Berkeley, Berkeley, CA (2005—2009)
B.S. in Business Administration, 3.91 GPA
Honors: *summa cum laude;* Dean's List for five semesters

LEGAL EXPERIENCE

California Department of Justice, Consumer Protection Section (6/2023—Present)
- Contribute to multistate investigation involving novel technology and consumer protection legal issues.

The White House Counsel's Office (1/2023—5/2023)
- Researched and drafted vetting memos for potential judicial and other Senate-confirmed nominees.
- Prepared memos involving novel legal questions and applicable case, statutory and regulatory precedent.
- Reviewed proposed agency rules and recommended areas for input based on White House equities.
- Conducted legal research and contributed to guidance related to the Administration's equity policies.

Consumer Financial Protection Bureau, Legal Division (8/2022—11/2022)
- Researched and drafted parts of an appellate brief related to debt practices of national student loan trust.
- Wrote and presented memo to General Counsel to inform untested application of Bureau's authority.

Community Legal Services, Housing Unit (5/2022—8/2022)
- Managed pre-trial caseload of clients facing eviction, conducting intake and advising on defenses.

U.S. House Committee on Oversight and Reform, Economic Policy (1/2022—4/2022)
- Co-led significant consumer product investigation, contributing to successful legislative fix.

Georgetown Law Center on Poverty and Inequality (8/2021—12/2021; 6/2022—8/2022)
- Researched and co-wrote major report on effect of market power on racial and economic inequality.

OTHER PROFESSIONAL EXPERIENCE

WeWork, New York, NY
Director of Impact and Public Policy Partnerships (7/2017—8/2020)
- Launched global refugee initiative, training and hiring hundreds of refugees and serving as spokesperson.
- Scaled a local veterans program into a national veteran and military spouse business incubator in 20 cities, growing the businesses of 400+ entrepreneurs while leading a team of 50 staff and volunteers.
- Developed and launched a national economic opportunity research partnership with the Aspen Institute.
- Managed a high-performing team, including consultants and agencies, and a $1M budget.

Getaround, San Francisco, CA
Head of Public Policy and Business Development (3/2015—6/2017)
- Built partnerships with policymakers and community groups in 10 cities to grow carsharing market.
- Managed government grant and pilot program, including with the SFMTA and the City of Chicago.
- Negotiated and launched a technology partnership with Toyota, resulting in a $10M strategic investment.

SustainAbility, Washington, D.C., London, UK & San Francisco, CA
Manager and Head of Trends and Cities Practices (9/2010—2/2015)
- Managed ESG strategy projects for F500 companies in mobility, energy, and cities practices.
- Managed global research initiatives, including a trends team and a quarterly ESG survey partnership.

Kiva, Ramallah, Palestine
Kiva Microfinance Fellow with CHF International and FATEN (9/2009—1/2010)
- Executed 20-week work plan in 10 weeks, streamlining the loan processes of the two largest microfinance lenders in country and growing the number of loans dispersed to micro-entrepreneurs.

Record of: Mohammed Al-Shawaf
GUID: 813478545

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	001	93	Legal Process and Society Naomi Mezey	4.00	B+	13.32	
LAWJ	002	93	Bargain, Exchange, and Liability David Super	6.00	A-	22.02	
LAWJ	005	30	Legal Practice: Writing and Analysis Jessica Wherry	2.00	IP	0.00	
LAWJ	009	31	Legal Justice Seminar Kevin Tobia	3.00	B+	9.99	

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	45.33	3.49
Cumulative	13.00	13.00	45.33	3.49

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	003	93	Democracy and Coercion Louis Seidman	5.00	B+	16.65	
LAWJ	005	30	Legal Practice: Writing and Analysis Sherri Lee Keene	4.00	B+	13.32	
LAWJ	007	93	Property in Time Daniel Ernst	4.00	A-	14.68	
LAWJ	008	32	Government Processes Glen Nager	4.00	A	16.00	

	EHrs	QHrs	QPts	GPA
Current	17.00	17.00	60.65	3.57
Annual	30.00	30.00	105.98	3.53
Cumulative	30.00	30.00	105.98	3.53

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	1491	110	~Seminar Alexander Blanchard	1.00	A	4.00	
LAWJ	1491	112	~Fieldwork 3cr Alexander Blanchard	3.00	P	0.00	
LAWJ	1491	19	Externship I Seminar (J.D. Externship Program) Alexander Blanchard		NG		
LAWJ	165	07	Evidence Gerald Fisher	4.00	A-	14.68	
LAWJ	410	05	State and Local Government Law Meryl Chertoff	3.00	A	12.00	
LAWJ	565	05	Globalization, Work, and Inequality Seminar Alvaro Santos	3.00	A	12.00	

In Progress:

	EHrs	QHrs	QPts	GPA
Current	14.00	11.00	42.68	3.88
Cumulative	44.00	41.00	148.66	3.63

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	1447	08	Mediation Advocacy Seminar	2.00	A	8.00	
LAWJ	1492	41	Externship II Seminar (J.D. Externship Program)		NG		
LAWJ	1492	89	~Seminar	1.00	A	4.00	
LAWJ	1492	91	~Fieldwork 3 cr	3.00	P	0.00	
LAWJ	215	07	Constitutional Law II: Individual Rights and Liberties	4.00	A-	14.68	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	10.00	7.00	26.68	3.81
Annual	24.00	18.00	69.36	3.85
Cumulative	54.00	48.00	175.34	3.65

End of Juris Doctor Record

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to provide this letter of recommendation for Mohammed Al-Shawaf as he seeks employment as a Judicial Clerk. Mo served as an Intern on the Ethics & Compliance team in the Office of the White House Counsel during the Spring semester 2023. I had the pleasure of serving as Mo's internship coordinator, although he worked closely with and received assignments from several attorneys over the course of his internship.

Mo was a thoughtful and productive team member who approached each project with enthusiasm. He asked insightful questions when receiving assignments, conducted exhaustive research, and created clear and well-written work product. He completed projects quickly and efficiently, even when he had to absorb new areas of the law first. He diplomatically juggled competing projects for multiple attorneys, diligently checking in to ensure he was meeting all expectations and prioritizing as appropriate.

Most of all, Mo was a wonderful presence in the office. He is courteous, collegial, and professional, and our team benefitted from his support over the past few months. I am very happy to support him with my strong recommendation.

Very respectfully,

Anjali Phillips
Special Assistant to the President and
Associate Counsel

Anjali Phillips - Anjali.W.Phillips@who.eop.gov

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to write in support of Mohammed Al-Shawaf's application for a clerkship in your chambers. Mr. Al-Shawaf is a talented, hard-working law student firmly committed to a career in public service. He will make an excellent law clerk and an even better attorney.

I came to know Mr. Al-Shawaf when he was enrolled in my class that combines Torts with Contracts. This course is part of Georgetown's alternative curriculum, which typically attracts the most intellectually adventurous students. Mr. Al-Shawaf was very much that sort of student: eager to explore the law from a variety of perspectives, wanting to know not just where it is today but where it came from and where it might be going. He was consistently impressive in all aspects of my course: in class, with his questions during office hours, and on the midterm and the final. He is very smart, has a nuanced vision of the law, writes with subtlety and finesse, and recognizes hidden tensions doctrinal rules and their policy justifications. He is well-equipped produce work that is both of the highest standards technically and that provides thoughtful perspectives on the cases before you beyond merely recounting those advanced by counsel.

Mr. Al-Shawaf is quite remarkable for the depth and breadth of his interests in the law. At my invitation, we met several times to discuss legal issues far-removed from the topics within my course, both during his time in my class and from time to time since. On any topic, he has numerous questions, which are uniformly terrific. He is a true intellectual, but unlike many students of his intellect and range of interests, he also is deeply interested in how things work in the real world. As a law clerk, I would expect him to give you comprehensive research, concise and accurate analyses of the issues in a case before you, but also the benefit of his considerable common sense and insight into what is actually happening between the parties.

I have no doubt that Mr. Al-Shawaf will be an excellent team player and favorite of the other members of your staff. He is flawlessly polite and exceedingly considerate – going to great lengths to minimize his burden on my time – but he also has a pleasant but respectful informality about him. And although he remains fully focused when work is in order, at down times he has a delightful understated sense of humor.

In sum, I can confidently and enthusiastically recommend Mohammed Al-Shawaf for a clerkship in your chambers. He is precisely the kind of student whose accomplishments will bring pleasure and pride to all those that mentored him for many years to come. I would be happy to provide any additional information that you might require to evaluate his application.

Sincerely yours,

David A. Super
Carmack Waterhouse Professor of Law and Economics

David Super - das62@georgetown.edu - 202 525 9132

May 23, 2023

Re: Mohammed Al-Shawaf Clerkship Application

Dear Judge,

I am writing to highly recommend Mohammed Al-Shawaf for a clerkship in your chambers. I am the Managing Attorney of the Housing Unit at Community Legal Services in Philadelphia. Community Legal Services is a nonprofit organization providing direct legal representation, advocacy and community education for low-income Philadelphians for a wide range of civil legal issues. Mohammed worked in the Housing Unit as a law student intern after completing his first year of law school at Georgetown University. I oversaw Mohammed's work during our ten-week internship program and have kept in touch with him since working together.

We selected Mohammed for our summer law student internship program because of the dedication he had shown prior to law school to understanding how systemic inequality historically and currently marginalizes minority communities and his work to address these inequalities. With minimal supervision, Mohammed managed a caseload of clients facing eviction prior to their hearing dates. Mohammed interviewed the clients, advised them of their rights and legal defenses and assisted supervising attorneys with trial preparation and settlement negotiation in Municipal Court. Being a successful attorney at Community Legal Services requires someone who is adept at leveraging legal, policy and advocacy tools to advance protections for our clients. Mohammed's past experience leading social impact projects in large and small organizations and his commitment to economic justice across his work experience and in law school made him a valuable asset to CLS.

Because of his experience, enthusiasm and proactive nature, Mohammed also made himself an important contributor to CLS' policy priorities in a very short period of time. In addition to his regular caseload, Mohammed took the initiative to quickly learn and contribute to Philadelphia's new Eviction Diversion Program, considered a national model and highlighted in a letter from the Department of Justice to the fifty state supreme court justices. Mohammed conducted legal research and wrote claim and demand letter templates so that CLS attorneys and unrepresented tenants could better enforce new eviction prevention laws as part of the Eviction Diversion Program.

While Mohammed has a diverse legal and non-legal work background, the through line is a commitment to working towards the public interest and a persistence in developing and applying his considerable skills to that effort. I saw the value of Mohammed's skills, initiative, and experience working with him last summer and it is why I believe he would be a great addition to your chambers. Please call me at (215) 981-3778 or email me at rgarland@clsphila.org if I can be of any further assistance.

Sincerely,

Rachel Garland
Managing Attorney, Housing Unit

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write this letter of recommendation on behalf of Mohammed Al-Shawaf, who was a student in my State and Local Government Law class in the fall semester of 2022. Mohammed ("Mo") was a star in a class that included several very strong students, the kind of students who make it worth teaching in the first place. Mo stood out for several reasons, and I want you to tell you about them.

First, Mo was exceptionally mature, bringing with him from his impressive years of work experience a wide range of content area knowledge and academic acumen. This was in addition to his level of preparation, which was flawless, his thoughtful and synthetic oral interventions in the classroom, and some of the best-written papers I have read in a dozen years of teaching. Not only was his research thorough, but he brought in both legal and policy materials, and wove them together seamlessly. For his midterm paper, he wrote about a local energy model in California, its statutory background, and the underlying legal and policy choices that shaped its development and ongoing implementation. After the papers were de-anonymized, I saw that I had written on his–"a pleasure to read"--and it was. I started my legal teaching many years ago as an instructor of legal writing, and my standards for writing are high. There was not a single thing I would have changed in that essay; and in fact, I am encouraging Mo to submit it for publication.

Mo also has unique personal qualities which would make him an excellent law clerk. First, he has exceptional emotional intelligence. As you may know, the transition back to a post-pandemic "normal" classroom has been something of a challenge. In Mo, I had an ally. He is a connector, and a natural leader. He suggested a classroom seating layout that allowed for better inclusion and communication, and improved the classroom experience for everyone that way. He had a way of checking in on his peers. He listened in the classroom both to the professor and to the other students, asked questions that furthered the conversation, and he was not afraid to ask for guidance when he thought he needed it (and sometimes, I think, when he believed others might need it)

I have had several conversations with Mo outside of class, and he is thoughtful, committed to social justice, and a general delight. His resume, which I know you have seen, shows an ascending degree of responsibility in policy jobs, including some impressive leadership positions, and most recently a coveted position in the White House Counsel's office. I have no doubt that Mo will ascend to a leadership role in public law, and we'll be lucky to have a public servant like him. A clerkship would be a valuable part of his education, because of the rigor of the judicial writing and research process, and the mentorship he will receive. I believe that if you hire Mo, he will become a valuable mentee, thought partner, and member of the family of clerks. He has my highest recommendation, and I would be glad to answer any questions.

Very respectfully,

Meryl Justin Chertoff
Adjunct Professor of Law and
Executive Director
Georgetown Project on State and Local Government Policy and Law

Meryl Chertoff - mjc87@georgetown.edu - 9083707082

Mohammed Al-Shawaf

6630 Blair Rd NW, Washington, D.C. 20012 | ma2112@georgetown.edu | 831-402-2229

WRITING SAMPLE

The attached writing sample is an excerpt from a brief I submitted in my Legal Research and Writing course. The fictitious case, *United States v. Bell*, involved an order from the United States District Court for the District of Maryland to suppress evidence because the government's stop of Mr. Bell violated his Fourth Amendment rights. I represented the petitioner, the United States, appealing the district court's order to the United States Court of Appeals for the Fourth Circuit.

The following sections of the brief are omitted for space: Cover page, Table of Authorities, and Argument Section II A (2) and B (1). The Statement of the Case follows course instructions for citations to the record (Joint Appendix or JA). This sample has not been edited by others and is entirely my own work.

STATEMENT OF THE ISSUE

Whether the district court erred when it did not find that a trained narcotics agent had reasonable suspicion to stop a suspected drug smuggler after the agent verified significant details of an anonymous tip and observed the defendant's evasive behavior.

STATEMENT OF THE CASE

Special Agent William Moreland is a federal narcotics agent with DEA. *JA 3.* At the time of the events in question, Agent Moreland had over sixteen months of specialized narcotics experience, including the prior six months where he investigated drug trafficking cases at BWI Airport as a member of a joint federal and state task force. *JA 12*. Agent Moreland is no stranger to law enforcement nor its commitment to upholding public safety, having served as a Baltimore police officer for four years prior to joining DEA. *JA 3*.

On September 15, 2019, Agent Moreland was on duty when he received an anonymous tip describing a man arriving to BWI on a morning flight from Dallas smuggling cocaine in a backpack. *JA 3*, *22*. The tipster described knowing the suspect socially and attending a party with him the previous night. At the party, the suspect had shared his plan with multiple people to smuggle cocaine on the flight to BWI the next day, describing his method of packing drugs in his backpack to avoid detection as well as his clientele in Baltimore. *JA 22*. The tip further described the suspect as a black male that resembled the Mayor of Dallas and went by the nickname "Stringer." *Id.* The tip also mentioned the suspect could be identified by the ubiquity of the Dallas Cowboys gear he wore, describing the likely attire as a shirt and a cap. *Id.*

Per his training as a narcotics investigator, Agent Moreland attempted to corroborate the tip's information. *JA 5.* He observed a morning flight from Dallas that arrived at BWI around 1:00 pm, matching the time frame given by the tipster. *Id.* Agent Moreland identified only one individual, the defendant Mr. Bell, that matched the tip's description. The defendant was a black male whose facial

features and age bore some resemblance to the tipster's Mayor of Dallas description. *JA 13.* The defendant also wore a Cowboys shirt and carried a backpack with a Cowboys logo. *JA 6.*

Agent Moreland attempted to further corroborate the tip while the defendant was in line at an airport convenience store. *JA 7.* During a brief conversation Agent Moreland struck up about the Cowboys, the defendant claimed he was in Baltimore to visit his grandmother and did not know when he was returning to Dallas. *Id.* Agent Moreland subsequently confirmed he was known primarily by a nickname. *JA 8.* When he attempted to verify the nickname, the defendant's appearance visibly changed, and he aggressively asked Agent Moreland to identify himself. *Id.* When Agent Moreland disclosed he was a DEA agent, the defendant abruptly stopped talking, exited the line after paying for his purchase, and hurriedly left the area. *Id.*

Agent Moreland followed the defendant as he moved towards baggage claim, observing him "walking quickly" and "weaving around people" as if he was in "a big hurry." *Id.* Agent Moreland saw the defendant look over his shoulder at least two times to see if he was being followed, nearly running into a woman with a stroller in his haste. *JA 9.* Agent Moreland additionally noticed he did not pick up any checked luggage. *Id.*

When the defendant looked over his shoulder a third time in the taxi line, he recognized Agent Moreland. *JA 10.* The defendant seemed "nervous and agitated," was "not making eye contact," and sweat profusely as Agent Moreland approached. *Id.* The defendant moved to get into a taxi, and Agent Moreland stopped him and asked for his full name and identification. *Id.* When Agent Moreland noticed multiple fraudulent driver's licenses containing the defendant's picture in his wallet, he arrested Mr. Bell for federal identity fraud. *Id.*

On February 10, 2021, the United States District Court for the District of Maryland granted the defendant's motion to suppress the discovery of the fraudulent driver's licenses on Fourth Amendment grounds but stayed its order pending appeal. *JA 24-25*.

SUMMARY OF THE ARGUMENT

This case concerns whether trained law enforcement officers can exercise their duty to stop the illegal trafficking of dangerous drugs by using reliable citizen tips and their own assessments of drug smuggling behavior developed from extensive field experience.

The anonymous citizen tip exhibited multiple characteristics of reliability and supplied a basis for Agent Moreland's reasonable suspicion to stop Mr. Bell. The tip contained significant, predictive detail about the defendant's travel itinerary, which Agent Moreland corroborated, along with key aspects of the defendant's identity and appearance. The tipster described how they knew the defendant and detailed his plan to smuggle cocaine through BWI Airport, establishing a strong basis of knowledge for the tip's allegation of drug trafficking.

Independent of the anonymous tip, Agent Moreland's assessment of the defendant's suspicious acts and behavior supported a stop. Agent Moreland's specialized narcotics training and substantial law enforcement experience informed his observations of the defendant's activities. The defendant abruptly and quickly left the area after learning of Agent Moreland's identity and wildly weaved through crowds while repeatedly looking back to see if he was followed. The defendant did not pick up any luggage despite claiming the reason for his visit was an open-ended stay to see his grandmother. Finally, the defendant displayed visible signs of nervous behavior while attempting to flee the airport. Although capable of construing innocently on their own, these facts viewed together by a trained agent indicate a reasonable suspicion of illegal activity. When bolstered further by a significantly corroborated tip detailing the illegal activity of the defendant, Agent Moreland was justified in stopping Mr. Bell based on the totality of the circumstances. Accordingly, the United States asks you to reverse the district court's decision to suppress evidence.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review for considering a motion to suppress evidence on appeal is review of a district court's factual findings for clear error and its legal determinations *de novo*. *United States v. Perkins*, 363 F.3d 319, 320 (4th Cir. 2004).

II. AGENT MORELAND HAD REASONABLE SUSPICION OF THE DEFENDANT'S ILLEGAL ACTIVITY TO JUSTIFY AN INVESTIGATORY STOP BASED ON THE TOTALITY OF THE CIRCUMSTANCES

Agent Moreland corroborated significant details of an anonymous tip alleging the defendant was smuggling illegal drugs and observed a series of nervous and evasive behaviors by the defendant that warranted a minimally intrusive stop. Consistent with the Fourth Amendment, an officer may conduct a brief investigatory stop if there is a "reasonable, articulable suspicion that criminal activity is afoot." *See Illinois v. Wardlow*, 528 U.S. 119, 123 (2000); *Perkins*, 363 F.3d at 321. Reasonable suspicion is not assessed by analyzing individual facts that may have innocent explanations on their own, but on the "totality of the circumstances" observed by a trained officer. *See Illinois v. Gates,* 462 U.S. 213, 231 (1983).

Reasonable suspicion can be based on an anonymous tip that provides sufficient, verifiable information about the suspect and crime to demonstrate its reliability to an officer. *See Alabama v. White*, 496 U.S. 325, 330 (1990). Observations of suspicious behavior made by a trained officer can also independently justify reasonable suspicion. *See United States v. Sokolow*, 490 U.S. 1, 2 (1989). Agent Moreland's corroboration of material aspects of the anonymous tip and observations of the defendant's suspicious behavior informed by his specialized narcotics experience amounted to reasonable suspicion and warranted the brief stop.

A. The anonymous tip possessed multiple indicators of reliability to establish a basis for reasonable suspicion.

Agent Moreland justifiably relied on an anonymous tip bearing numerous markers of trustworthiness. Anonymous information is well-established as a grounds for an investigatory stop if it

exhibits "sufficient indicia of reliability." *See White*, 496 U.S. at 332. Courts have consistently identified certain factors that support the overall reliability of an anonymous tip. *See Gates*, 462 U.S. at 233.

A tip is reliable if it contains predictive information and detail about the individual and alleged criminal activity, which are at least partially corroborated by an officer. *See White*, 496 U.S. at 331. Additionally, an informant's basis of knowledge lends "significant support to the tip's reliability." *See Navarette v. California*, 572 U.S. 393, 399 (2014). Agent Moreland corroborated the tip's predictions of the defendant's travel itinerary and key identifying features of his appearance. Combined with the tipster's detailed basis for this information, the tip is a reliable means to establish reasonable suspicion.

1. Agent Moreland corroborated significant predictive information and key identifying details of the tip.

Agent Moreland verified the tip's predictions of the defendant's travel itinerary and specific features of the defendant's identity and attire, demonstrating the tip's reliability. The independent corroboration of "significant aspects of an informer's predictions" that are not easily predicted impart some degree of reliability to a tip's other allegations. *See White*, 496 U.S. at 331-32. The presence of detail about the individual and alleged criminal activity further increases the tip's reliability. *See United States v. Elston*, 479 F.3d 314, 318 (4th Cir. 2007).

In *White*, the Supreme Court found officers had reasonable suspicion to stop a suspected cocaine smuggler after corroborating certain predictive and seemingly innocent details. *See White*, 496 U.S. at 331-32. The anonymous tipster told the police that a woman would drive from a particular apartment building to a particular motel within a specified timeframe and described certain identifying features of the vehicle. *See id.* The tipster also asserted that the woman would be transporting cocaine in a brown bag. *See id.* Within the timeframe identified, the officers corroborated the description of the vehicle, the location, and the presumed route to the motel before stopping the suspect. *See id.* Although the officers did not identify the bag allegedly containing cocaine, the Court found that the predictive facts the officers did corroborate—the defendant's travel itinerary and key identifying features—allowed a reasonable

inference that the tipster knew about the suspect's illegal activity because "only a small number of people … are privy to an individual's itinerary." *See id.* at 332.

Like the tip in *White* that accurately predicted the defendant's location, route and time frame of travel, the tip here accurately predicted the defendant would be arriving at BWI Airport on a morning flight from Dallas. *See id.* at 331-32. The tip also gave identifying details that Agent Moreland corroborated, including the defendant's physical appearance and likeness, the Cowboys gear he could be identified with, and that he was known primarily by a nickname.

Agent Moreland additionally verified the presence of the defendant's backpack allegedly transporting cocaine before making a stop, an analogous fact that even officers in *White* did not corroborate before their stop. *See id.* Although Agent Moreland acknowledged the shortcomings of the Mayor of Dallas comparison and could not confirm the defendant's specific nickname, the Court's precedents demonstrate reasonable suspicion does not require 100 percent verification of the tip. *See id.* Rather, reasonable suspicion is met when an officer corroborates significant aspects of a tip's predictions and key identifying details that, when viewed together, give credence to the tip's allegations of illegality. *See id.* Agent Moreland's corroboration of predictive travel itinerary information and details of the defendant's appearance and attire made the tip's allegation of illegality reliable.

2. The tipster shared a detailed basis of knowledge for their information.

[Omitted for space]

B. Agent Moreland's trained assessment of the defendant's suspicious activities and behavior warranted the stop.

Agent Moreland's experience and training informed his observations of the defendant's suspicious actions at the airport. Law enforcement officers are trained to make inferences from observable facts that, while appearing meaningless to untrained eyes, can warrant reasonable suspicion. *See United States v. Cortez*, 449 U.S. 411, 419 (1981); *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000). Agent Moreland's narcotics experience clued him into recognizing the defendant's evasive acts in the airport and nervous behavior at the taxi stand as indicators of reasonable suspicion.

1. Agent Moreland's narcotics training and experience require deference.

[Omitted for space]

2. Agent Moreland's observations of the defendant's nervous and evasive behavior indicated reasonable suspicion.

Agent Moreland's trained observations of the defendant's behavior at the airport, including his nervous and evasive acts, was sufficient to establish reasonable suspicion of the defendant's illegal activity. Courts have recognized common indicators of drug trafficking that, when observed by an experienced agent, provide evidence of reasonable suspicion. *See United States v. Sokolow*, 490 U.S. 1, 10 (1989). The factors include a suspect who does not check luggage at an airport, indicating their intention to return shortly after trafficking drugs to a new location; walks quickly or hurriedly—especially in the presence of law enforcement; and appears nervous or excessively sweats in front of an officer. *See, e.g., Florida v. Rodriguez*, 469 U.S 1, 3 (1984); *United States v. Harrison*, 667 F.2d 1158, 1161 (4th Cir. 1982); *United States v. Mason*, 628 F.3d 123, 129-30 (4th Cir. 2010).

In *Harrison*, the Fourth Circuit found DEA agents had reasonable suspicion to stop a drug smuggling suspect after solely observing the defendant's behavior at an airport. *See Harrison*, 667 F.2d at 1161. The suspect had no checked luggage, and upon noticing an agent observing him, made a "peculiar head motion" and started walking "very quickly" through the airport. *See id.* at 1159. The suspect further appeared "nervous and fidgety" when approached by the agent in the taxi line. *See id.* at 1160. The court acknowledged that while any of the facts alone would not amount to reasonable suspicion, these indicators observed collectively by a trained agent justified the stop. *See id.* at 1161.

Like the suspect in *Harrison*, the defendant in this case exhibited multiple suspicious behaviors once he became aware that a federal agent was observing him. *See id.* The defendant abruptly stopped speaking to Agent Moreland, walked hurriedly, and weaved through crowds as he motioned his head back and forth to see if he was being followed. The defendant had no checked luggage, despite his claim of an open-ended stay in Baltimore. Finally, as Agent Moreland approached him in the taxi stand, he avoided eye contact, appeared "nervous and agitated" and sweat profusely. Although the defendant's individual

behaviors could be construed innocently in isolation, they amount to reasonable suspicion of illegal activity when viewed in their totality.

C. Agent Moreland had reasonable suspicion to justify a stop based on the totality of circumstances.

Agent Moreland's corroboration of significant aspects of an anonymous tip alleging illegal drug smuggling and his own observations of the defendant's suspicious behavior amounted to reasonable suspicion. "The totality of the circumstances must be evaluated to determine the probability, rather than the certainty, of criminal conduct." *United States v. Sokolow*, 490 U.S. 1, 2 (1989). The Court's precedents demonstrate that officers can stop individuals "to resolve ambiguities in their conduct" and even "accepts the risk that officers may stop innocent people." *See Illinois v. Wardlow*, 528 U.S. 119, 120 (2000). Although individual acts in isolation may appear "quite consistent with innocent travel," they can "amount to reasonable suspicion that criminal activity was afoot" when viewed together by a trained agent. *See Sokolow*, 490 U.S. at 2.

The tip's accurate predictions of the defendant's travel itinerary, the corroboration of substantial aspects of the defendant's identity and appearance, and the tipster's basis of knowledge may have warranted reasonable suspicion on its own. Agent Moreland, however, continued to investigate for further indicators of suspicious behavior. Agent Moreland observed the defendant's evasive movements upon learning of the presence of law enforcement, noticed he did not pick up any luggage, and recognized the defendant's "nervous and agitated" demeanor and profuse sweating as he approached. Only then did Agent Moreland stop the defendant for his identification. Based on the totality of circumstances, Agent Moreland had reasonable suspicion of the defendant's illegal activity to justify an investigative stop.

CONCLUSION

For the foregoing reasons, the district court's decision to suppress evidence should be reversed.

Mohammed Al-Shawaf, Counsel for Appellant

Applicant Details

First Name	**Josh**
Last Name	**Almond**
Citizenship Status	**U. S. Citizen**
Email Address	**jalmond@unc.edu**
Address	**Address** **Street** **203 Conner Dr., Apt 5** **City** **Chapel Hill** **State/Territory** **North Carolina** **Zip** **207514** **Country** **United States**
Contact Phone Number	**2405435712**

Applicant Education

BA/BS From	**James Madison University**
Date of BA/BS	**May 2021**
JD/LLB From	**University of North Carolina School of Law** **https://law.unc.edu/**
Date of JD/LLB	**May 11, 2024**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**North Carolina Banking Institute Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Broome, Lissa
lbroome@email.unc.edu
919.962.7066
Brinkley, Martin
martin92@unc.edu
Gerhardt, Deborah
dgerhardt@unc.edu
(919) 962-7219

This applicant has certified that all data entered in this profile and any application documents are true and correct.

JOSHUA ALMOND

jalmond@unc.edu • (240) 543-5712
Current Address: 203 Conner Dr. Apt 5, Chapel Hill, NC 27514
Permanent Address: 305 Bridle Crest Sq. NE, Leesburg, VA 20176

June 12, 2022

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year law student at the University of North Carolina School of Law seeking a clerkship position for the 2024-2025 term. As a native Virginian born in Chesapeake and raised in Leesburg, I am interested in retuming to Virginia to practice law and give back to the community that shaped me as a person. My experience as the Editor-in-Chief of the North Carolina Banking Institute Journal and my standing within the top 15% of my class demonstrates my ability to succeed in a clerkship position.

As the Editor-in-Chief of the North Carolina Banking Institute Journal, I have coordinated an entire year of programming to successfully publish our upcoming volume. This includes soliciting and editing professional articles, grading applications for staff membership, and organizing our yearly "Banking Institute," a CLE program held in Charlotte, North Carolina for several hundred attorneys. This experience demonstrates my time management and leadership skills, in addition to my sharp legal writing and research skills, preparing me well for a clerkship position.

Further, the training I have received from the attorneys at Potter Anderson & Corroon in Wilmington, Delaware has been immensely helpful thus far this summer. I have reviewed numerous Court of Chancery complaints and briefs, learning from experienced litigators about how to be a successful writer within a prestigious jurisdiction. These same skills would readily apply to this clerkship position.

Further materials are attached to this application, and if any other documents are requested, I can have them supplied as soon as possible. I welcome the opportunity to speak with you about a clerkship position and can be reached at 240-543-5712 or jalmond@unc.edu. Thank you for your time and consideration.

Sincerely,
/s/ Joshua Almond